(1)

91-101

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

NO. _____

SUPREME COURT OF THE
UNITED STATES OF AMERICA

OCTOBER 1990 TERM

UNIVERSAL FOODS CORPORATION,

Plaintiff-Petitioner,

vs.

STATE OF WISCONSIN LABOR &
INDUSTRY REVIEW COMMISSION
and BARBARA DAMATO,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD FOR
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QUESTIONS PRESENTED FOR REVIEW

1. Did this Court in Lingle vs. Norge Division of Magic Chef, 486 U.S. 399, 108 S. Ct. 1877, 100 L.Ed. 2d 410 (1988) intend to allow a state law cause of action expressly governed by the terms of a collective bargaining agreement?

2. Is an interpretation or analysis of a collective bargaining agreement necessary in order for a state agency to decide whether an employee has a valid claim under Wis. Stats. Section 102.35(3), so as to cause pre-emption by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185?

LIST OF ALL PARTIES

All of the parties to this proceeding are listed in the caption on the cover. Universal Foods Corporation is a corporation without a parent company. All of the subsidiaries of Universal Foods Corporation are wholly owned subsidiaries. There are no partially owned subsidiaries of Universal Foods Corporation.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv-vii
REFERENCE TO OTHER REPORTS OF OPINIONS DELIVERED IN THIS CASE	viii
GROUNDS FOR JURISDICTION	viii
STATUTES INVOLVED	ix
STATEMENT OF THE CASE	1
ARGUMENT	11
POINT A: THE WISCONSIN DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND FEDERAL APPELLATE PRECEDENT	11
CONCLUSION	25
APPENDIX	A-1-158

TABLE OF AUTHORITIES

CASES

1. Allis Chalmers vs. Lueck, 471 U.S. 202, 210, 213, 220, 105 S. Ct. 1904, L.Ed. 2d 206 (1985)

p. 11, 12, 17, 18, 22

2. Hanks vs. General Motors Corporation, 859 F. 2d 67, 69 (8th Cir. 1988)

p. 23

3. Harris vs. Alumax Mill Products, Inc., 897 F. 2d 400, 403 (9th Cir. 1990)

p. 23

4. Jackson vs. Liquid Carbonic Corp., 863 F. 2d 111, 118-121 (1st Cir. 1988)

p. 19, 23

5. Johnson vs. Beatrice Foods Company, 921 F. 2d 1015, 1020 (10th Cir. 1990)

p. 23

6. Kirby vs. Alleghany Beverage Corp., 811 F. 2d 253, 255-6 (4th Cir. 1987)

p. 19

7. Lingle vs. Norge Division of Magic Chef, Inc., 486 U.S. 399, 411, 413, 418-9, 422, 108 S. Ct. 1877, 100 L.Ed. 2d 410 (1988)

p. 7-8, 11, 12, 20, 23

8. Litton Financial Printing Division vs. NLRB, No. 90-285, ____, U.S. ____, 111 S. Ct. 2215, ____ L.Ed. 2d ____ (Decided June 13, 1991)

p. 22

9. Magerer vs. John Sexton & Company, 912 F. 2d 525, 527, 529 (1st. Cir. 1990)

p. 15, 16, 24

10. Miller vs. AT & T Network Systems, 850 F. 2d 543, 550-1 (9th Cir. 1988)

p. 19

11. Sluder vs. United Mine Workers of America, 892 F. 2d 549, 554-6 (7th Cir. 1989)

p. 23

12. Stikes vs. Chevron USA, Inc., 914 F. 2d 1265, 1269-1270 (9th Cir. 1990)

p. 19

13. Universal Foods Corporation vs. LIRC, ____ Wis. ____, 467 N.W. 2d 793 (Wis. App. 1991)

p. 10, 24

STATUTES

1. Labor Management Relations Act,
Section 301, 29 USC Section 185
p. 7, 11-12, 16, 20

2. Mass. Gen. Laws Ch. 152 Section 75b
p. 16

3. Sec. 102.23(1)(a), Wis. Stats.
p. 9

4. Sec. 102.35(3), Wis. Stats.
p. 7, 8-9, 10, 12, 13
18, 19, 24

5. Sec. 809.62(1), Wis. Stats.
p. 10-11

REFERENCE TO OTHER REPORTS OF OPINIONS DELIVERED IN THIS CASE

The decision of the State of Wisconsin Court of Appeals is being published. Universal Foods Corporation vs. Labor & Industry Review Commission, _____ Wis. _____, 467 N.W. 2d 793 (Wis. App. 1991).

GROUNDS FOR JURISDICTION

The State of Wisconsin Court of Appeals entered its decision in this matter on February 12, 1991. A timely Petition for Review was filed with the Supreme Court of the State of Wisconsin, on March 12, 1991. This Petition for Review was denied on April 30, 1991, which constitutes entry of the order denying discretionary review, referred to in Supreme Court Rule 13.1. This Court is given jurisdiction over this matter by

28 U.S.C. Section 1257.

STATUTES INVOLVED

1. 29 U.S.C. Section 185(a).

Suits for violation of contracts between an employer and the labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Section 102.35(3), Wis. Stats.

Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental

limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

3. Section 102.23, Wis. Stats. (1)(a).

The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either

interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under Ch. 227 or S. 801.02. Within 30 days after the date of an order or award made by the Commission either originally or after the filing of a Petition for Review with the Department under S. 102.18 any party aggrieved thereby may by serving a complaint as provided in Par. (b) in filing the summons and complaint with the Clerk of the Circuit Court commence, in Circuit Court, an action against the Commission for the review of the order or award, in which action the adverse party shall also be made a defendant. If the Circuit Court is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a

copy of any finding or order, it may extend the time in which an action may be commenced by an additional 30 days. The proceedings shall be in the Circuit Court of the county where the plaintiff resides, except that if the plaintiff is a state agency, the proceeding shall be in the Circuit Court of the county where the defendant resides. The proceedings may be brought in any Circuit Court if all parties stipulate and that court agrees.

4. Section 809.62(1).

A party may file with the Supreme Court a Petition for Review of an adverse decision of the Court of Appeals pursuant to s. 801.10 within 30 days of the date of the decision of the Court of Appeals. Supreme Court review is a matter of judicial discretion, not of right, and

will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the Court's discretion, indicates criteria that will be considered:

(a) A real and significant question of federal or state constitutional law is presented.

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

I. STATEMENT OF THE CASE

The employee, Barbara Damato, began working for the employer, Universal Foods Corporation, in 1983. She worked for approximately 6 weeks at which time she was permanently laid off. A-93-94.[1] She was called back to work in October, 1984, and worked approximately 4 weeks, at which time she was again issued a notice of lay-off. On the same date that she was notified of her lay-off, she reported that she had a problem with her arm. A-94. The problem with Ms. Damato's arm eventually resulted in elbow surgery. A-76. She was officially terminated, effective November 15, 1985, after having been laid off for a year. A-91, A-97-98.

From May 1, 1985 through April 30, 1988, the employer was subject to a

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[1]We will cite to the appropriate pages in the Appendix to this Petition.

collective bargaining agreement with Brewery Workers, Local 9 UAW, AFL-CIO, which covered the plant in which the applicant worked. The pertinent provisions of that collective bargaining agreement are as follows:

> "3.02: Notice of permanent job vacancy shall be posted and the applicant with greatest seniority shall receive the job vacancy, provided he is capable and qualified to perform the work. . . .
>
> Whenever the phrase 'capable and qualified' is used in this Article or elsewhere in this contract, the individual employee affected shall be entitled to a fair trial in

performing the work, accept in the following cases: . . . (c) where he has a known handicap which might prevent him from performing the job satisfactorily or safely. . . .

4.02: If further reductions are necessary in the department, then regular employees will be assigned or laid off in accordance with their seniority. The employee with the least seniority will be assigned or laid off first and so on in that order, provided the retained employees are capable and qualified of performing the remaining work.

4.03: . . . Employees hired after May 1, 1969, and laid off who have more than

five (5) years seniority shall forfeit all seniority rights after thirty-six (36) consecutive months of lay-off, and all employees with less than five (5) years of seniority shall forfeit all seniority rights after twelve (12) consecutive months of lay-off. . . .

4.05: When work is again available, employees will be recalled in the order of seniority. . . .

16.01: Where a grievance may arise by reason of an interpretation of this Agreement, the parties to this Agreement shall make all reasonable efforts to settle the same between them in the

following order and procedure:

(Whereupon provisions are set forth for a grievance and arbitration procedure) . . . "

A-115-124.

There was a dispute between the employer and the employee as to whether the employee was up for recall, and a job available, prior to November 15, 1985, when the employee would have forfeited all seniority rights pursuant to Article 4.03 of the collective bargaining agreement. The employer claimed that production never increased to the extent that employees with seniority similar to Ms. Damato's were called back to work. The employer gave examples of employees who had more seniority than Ms. Damato, and who lost their seniority at the same time. A-96-98. According to the employer, she was terminated, pursuant to

Article 4.03 of the collective bargaining agreement. A-97-98.

The employee testified that Bernard Frederick, the production superintendent of the employer's Packaging Department, called her in October 1985 and asked if she could come back to work. The employee allegedly told him about the cramp she was still having in her arm, and that she would contact her doctor to see what he thought. Her doctor allegedly advised her to give it a try. When she called Mr. Frederick back, he allegedly stated, "Never mind, we don't need you", and told her to keep in touch with him. A-77-78.

There was also a dispute between the employer and the employee as to whether the employee would have been capable of performing work at the employer, assuming

it was available. A-83-85, A-88, A-99-102.

The employee never grieved her termination. A-81-82.

On February 9, 1988, the employee filed an Application for Hearing before the State of Wisconsin Department of Industry Labor & Human Relations, claiming an unreasonable refusal to rehire within the meaning of Section 102.35(3), Wis. Stats. A hearing was held before an administrative law judge of that Department on January 23, 1989. A-72. At this hearing, counsel for the employer, Universal Foods Corporation, objected to the Department's jurisdiction, on the grounds that the case was preempted by Section 301 of the Labor Management Relations Act and Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L.Ed.

2d 410 (1988). A-74-75. The administrative law judge indicated that, until the Department of Industry, Labor and Human Relations advised him otherwise, he was obliged to conduct hearings in these types of cases. A-74-75. The administrative law judge dismissed the Application for Hearing on its merits. Findings of Fact and Order of Administrative Law Judge Thomas R. Jones, dated April 21, 1989. A-66-71.

The employee appealed the administrative law judge's decision to the State of Wisconsin Labor & Industry Review Commission (hereinafter LIRC), which reversed. Findings of Fact and Conclusions of Law of LIRC. (hereinafter "Decision of LIRC") A-53-65. LIRC found that the employer had unreasonably refused to rehire the employee within the meaning of Section 102.35(3), Wis.

Stats., and ordered the payments of money based upon that finding. A-60-62.

Universal Foods began this action for judicial review of the Decision of LIRC in the Circuit Court for Milwaukee County, pursuant to Section 102.23(1)(a), Wis. Stats. The issue of whether the applicant's claim under 102.35(3), Wis. Stats., was preempted by Section 301(a) of LMRA was thoroughly briefed before the Circuit Court. The Circuit Court, the Honorable Francis T. Wasielewski presiding, held that no interpretation of the collective bargaining agreement was necessary for LIRC to reach its decision. Therefore, the employee's claim under Section 102.35(3), Wis. Stats., was not preempted. A-46-48.

The Circuit Court's decision was timely appealed to the State of Wisconsin Court of Appeals. The issue of federal

preemption was thoroughly briefed once again before the Court of Appeals. The Court of Appeals indicated that no interpretation of the collective bargaining agreement was required for LIRC to decide this case. Hence, the employee's claim under Section 102.35(3), Wis. Stats., was not preempted. A-13-16.

Although initially not recommended for publication, the publication committee of the Court of Appeals has ordered that the opinion be published in the official reports. A-5-6. It is presently being published. Universal Foods Corporation vs. LIRC, _____ Wis. _____, 467 N.W. 793 (Wis. App. 1991).

Universal Foods timely filed a Petition for Review to the Supreme Court of the State of Wisconsin. In Wisconsin, Supreme Court review is a matter of judicial discretion. Section 809.62(1),

Wis. Stats. The preemption issue was fully explored in the Petition for Review. A-125-157. On April 30, 1991, the Supreme Court of Wisconsin denied the Petition for Review. Order of Supreme Court, State of Wisconsin, dated April 30, 1991. A-1-2.

II. ARGUMENT

A. THE WISCONSIN DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND FEDERAL APPELLATE PRECEDENT.

The published decision of the Wisconsin Court is in conflict with Allis Chalmers vs. Lueck, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985) and Lingle vs. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Under Lueck and Lingle, a state cause of action is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C.

Section 185, if its resolution requires an analysis, consideration or interpretation of a collective bargaining agreement. Lueck, supra, 47 U.S. at 213, 220; Lingle, supra, 486 U.S. at 418-9, 422.

The Wisconsin statute involved in this case specifically indicates that the provisions of a collective bargaining agreement shall govern:

> "In determining the availability of suitable employment . . . any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern." Section 102.35(3), Wis. Stats.

In this case, the employer specifically tried to prove that there was no suitable work available to the employee under the terms of the collective bargaining agreement. A-93-106. Under the terms of the statute, LIRC was required to analyze and consider the terms of the collective bargaining agreement in coming to its decision as to whether there was an unreasonable refusal to rehire. Section 102.35(3), Wis. Stats.

The language used by LIRC in its written decision, makes clear that it did analyze and consider the agreement:

> "The Commission majority concludes that a job was available and that the applicant was up for recall under the union contract procedure . . . .

> The Commission, however, has ruled that the employer unreasonably refused to rehire the applicant during the contract recall period. The employer has not shown that today the applicant would not be entitled under the union contract to the work which she can perform if the employer had not refused to rehire her in October of 1985."
>
> A-56-57, A-60-61.

LIRC made specific findings with respect to the employee's rights under the collective bargaining agreement. It would have been open to further evidence concerning what the employee's rights would have been, had she been rehired. The parties were litigating, and LIRC was deciding, the employee's rights under the

collective bargaining agreement. This is specifically prohibited by the preemption doctrine of Lueck and Lingle.

The Wisconsin court held that no interpretation of the collective bargaining agreement was necessary for LIRC to decide this case. A-13-16.

This decision is in direct conflict with Magerer vs. John Sexton & Company, 912 F. 2d 525 (1st Cir. 1990). Magerer involved a Massachusetts statute which was worded very similar to the Wisconsin statute:

> "(3) In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail."

Mass. Gen. Laws Ch. 152 Section 75b; Magerer, 912 F. 2d at 527 fn. 1.

In finding that the cause of action under the Massachusetts statute was preempted, the 1st Circuit distinguished the Illinois statute upheld in Lingle. Claims under the Massachusetts statute, by its express terms, were subject to the terms of any applicable collective bargaining agreement. To the extent that the collective bargaining agreement governed the conduct underlying the plaintiff's claim, the claim would require interpretation of the collective bargaining agreement, and therefore, was preempted by Section 301. Magerer, 912 F. 2d at 529. This same logic applies to the Wisconsin statute. It also, by its express terms, indicates that the

provisions of the collective bargaining agreement shall govern.

Where the resolution of a state law claim is substantially dependent upon an analysis, or is inextricably intertwined with consideration of the terms of the collective bargaining agreement, the claim is preempted. Allis Chalmers vs. Lueck, 471 U.S. at 213, 220. In this case, LIRC had to find that the employee was up for recall under the collective bargaining agreement, before it could find an unreasonable refusal to rehire. There was no other way to decide the case under the terms of the Wisconsin statute. Hence, the evaluation of the claim was substantially dependent upon and inextricably intertwined with a consideration of the terms of the collective bargaining agreement.

Lueck also specified that state law rights and obligations that can be waived or altered by agreement of the private parties are preempted by those agreements. 471 U.S. at 213. In this case, the length of time that employees may retain seniority rights while on lay-off, and the order upon which employees are to be recalled after lay-off, are terms which may be waived or altered by agreement of the private parties involved. A-116-120; Articles 4.02, 4.03 and 4.05. The employee's claim under Section 102.35(3), Wis. Stats., depends upon these terms of the collective bargaining agreement. Hence, it is preempted.

Under the Wisconsin statute, the ultimate finding which LIRC is called upon to make is whether the employer's action in refusing to rehire the employee

was "reasonable". Section 102.35(3), Wis. Stats. "Reasonableness" requires that everything be taken into account. Where the reasonableness of an employer's conduct vis-a-vis an employee is at issue, it necessarily requires an analysis of the terms of the collective bargaining agreement. Such actions are preempted. Stikes vs. Chevron USA, Inc., 914 F. 2d 1265, 1269-1270 (9th Cir. 1990); Jackson vs. Liquid Carbonic Corp., 863 F. 2d 111, 119 (1st Cir. 1988); Miller vs. AT & T Network Systems, 850 F. 2d 543, 550-1 (9th Cir. 1988); Kirby vs. Alleghany Beverage Corp., 811 F. 2d 253, 255-6 (4th Cir. 1987).

It is difficult to determine how the Wisconsin Court came to the conclusion that no interpretation of the collective bargaining agreement was required to decide the dispute in this case. The

full analysis of the Wisconsin Court is contained in a single paragraph, which is somewhat conclusory. A-15-16. It relies upon language from Lingle, which specifies that a state law claim is preempted by Section 301 of LMRA, only if such application requires the interpretation of a collective bargaining agreement. Lingle, supra, 486 U.S. at 413. It concludes that, because no interpretation was required here, there is no preemption. A-16.

It is a polite deception to say that no interpretation of the collective bargaining agreement was necessary to decide this case. LIRC was required to make a series of findings about the collective bargaining agreement to come to its decision. It explicitly found that the employee had enough seniority under the collective bargaining agreement

to be recalled vis-a-vis other employees. A-56-57; A-119-120, Article 4.05. It found that Article 4.03 gave the applicant a one-year recall period, during which she would not forfeit her seniority rights. It held that this period did not expire until November 15, 1985. A-56-67, A-60-61, A-118-119, Article 4.03. It found that the applicant was "capable and qualified" to perform the work within the meaning of Article 3.02. A-59-60, A-115-116, Article 3.02.

In order to make these findings, LIRC had to define the terms of the collective bargaining agreement. By defining these terms, LIRC was invading the field of federal labor law. If every state court and administrative agency was free to define collective bargaining agreements, it would lead to an erosion

of the federal labor law principles promoting the uniform interpretation of collective bargaining agreements. Lueck, 471 U.S. at 210.

In the recent decision of Litton Financial Printing Division vs. NLRB, No. 90-285, ____ U.S. ____, 111 S. Ct. 2215, ____ L.Ed. 2d. ____ (Decided June 13, 1991), this Court refused to defer to the NLRB's interpretation of a collective bargaining agreement, since it would risk the development of conflicting principles. (p. 8 on Westlaw) What is true for the NLRB is particularly true of state agencies and courts. To allow agencies and courts from fifty states to define collective bargaining agreement terms would create chaos in the field of federal labor law.

The Federal Courts of Appeals have held that state law causes of action are

preempted under Section 301(a) of LMRA if the state law claim requires scrutinizing, evaluating, studying, taking account of, referring to, considering, or analyzing a collective bargaining agreement. Johnson vs. Beatrice Foods Company, 921 F. 2d 1015, 1020 (10th Cir. 1990); Harris vs. Alumax Mill Products, Inc., 897 F. 2d 400, 403 (9th Cir. 1990); Sluder vs. United Mine Workers of America, 892 F. 2d 549, 554-6 (7th Cir. 1989); Jackson vs. Liquid Carbonic Corporation, 863 F. 2d 111, 118-121 (1st Cir. 1988); Hanks vs. General Motors Corporation, 859 F. 2d 67, 69 (8th Cir. 1988). LIRC did all of these. This case law would suggest that the meaning of "interpretation" as used by this court in Lingle, 486 U.S. at 411, is much broader than the narrow reading given by the Wisconsin Court.

Since the Wisconsin Court's decision is being published, Universal Foods Corporation vs. LIRC, _____ Wis. _____, 467 N.W. 2d 793 (Wis. App. 1991), the analysis of the Wisconsin Court will be the law in Wisconsin, unless certiorari is granted in this case. In Wisconsin, claims under Section 102.35(3), Wis. Stats., will continue to be governed by the terms of collective bargaining agreements, and state agencies will continue to analyze and consider the terms of collective bargaining agreements in deciding these claims. Wisconsin law will be at variance with federal preemption doctrine, as set forth in Lueck and Lingle, and as specifically applied by the 1st Circuit in Magerer vs. John Sexton & Company, 912 F. 2d 525 (1st Cir. 1990). In order to avoid this situation, the petitioner, Universal

Foods, respectfully requests that certiorari be granted in this matter, and that the Decision of the Court of Appeals in Wisconsin be reversed.

III. CONCLUSION

For the foregoing reasons, the petitioner, Universal Foods, respectfully requests that the Court grant a writ of certiorari to the Supreme Court of Wisconsin, and reverse the Decision of the Court of Appeals of Wisconsin.

Respectfully submitted:

Counsel of Record
for Plaintiff-Petitioner,
Universal Foods Corporation

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APPENDIX

		Page
1.	Order of Supreme Court of the State of Wisconsin denying Petition for Review, dated April 30, 1991	A-1
2.	Remittitur Order of Court of Appeals, dated May 1, 1991 . . .	A-3
3.	Publication Order of Wisconsin Court of Appeals, dated April 9, 1991	A-5
4.	Acknowledgment of Supreme Court of Wisconsin of receipt of Petition for Review, dated March 12, 1991	A-7
5.	Decision of the Court of Appeals of Wisconsin, dated February 12, 1991 . . .	A-10
6.	Judgment of Milwaukee County Circuit Court, dated July 25, 1990 . .	A-33

7. Memorandum Decision of Milwaukee County Circuit Court, dated July 10, 1990 . . . . . A-35

8. Findings of Fact, Conclusions of Law and Order of State of Wisconsin Labor & Industry Review Commission A-53

9. Findings of Fact and Order of Admin. Law Judge Thomas R. Jones A-66

10. Pages 1, 6-7, 9-11, 14-18, 22-37 of the Transcript of Testimony at the January 23, 1989 hearing A-72

11. Collective Bargaining Agreement, Respondent's Exhibit 5, Articles 3.02, 4.02, 4.03, 4.05 and 16.01 . . . . . A-115

12. Petition for Review to Supreme Court of Wisconsin, pages 8-23 . . . . . A-125

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 30, 1991

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The Court today announced an order in your case as follows:

No. 90-1734 Universal Foods Corp. v. LIRC and Damato L.C.#89CV014059

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-

petitioner Universal Foods Corporation, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, J., dissents.

MARILYN L. GRAVES
Clerk of Supreme Court.

COURT OF APPEALS
OF WISCONSIN
P. O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 1

REMITTITUR

UNIVERSAL FOODS CORPORATION,
PLAINTIFF-APPELLANT,

APPEAL NO. 90-1734

V.

T. Ct. NO. 89-CV-014059

LABOR & INDUSTRY REVIEW COMMISSION,
and BARBARA DAMATO,
DEFENDANTS-RESPONDENTS.

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON FEBRUARY 12, 1991, THAT:

JUDGMENT AFFIRMED.

MTS Wrote Decision/Opinion
RAF Wrote Dissenting Opinion
PANEL: HON. MICHAEL T SULLIVAN
HON. WILLIAM R MOSER
HON. RALPH ADAM FINE

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED: MAY 01, 1991.

/S/MLG

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

DISTRICT I

Office of the Clerk

COURT OF APPEALS

231 E. STATE CAPITOL
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APRIL 9, 1991

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LOWELL E. NASS
ASSISTANT ATTORNEY GENERAL

You are hereby notified that the Court has entered the following order:

#90-1734 UNIVERSAL FOODS CORPORATION v. LIRC & BARBARA DAMATO

BEFORE EICH, CHM., FINE, ANDERSON, LAROCQUE AND SUNDBY, JJ., PUBLICATION COMMITTEE.

THE COURT HAVING FILED ITS OPINION IN THE ABOVE-ENTITLED APPEAL AND THE COURT HAVING CONCLUDED PURSUANT TO RULE 809.23 THAT THE OPINION SHOULD BE PUBLISHED,

IT IS ORDERED THAT THE OPINION IN THE ABOVE-ENTITLED APPEAL BE PUBLISHED IN THE OFFICIAL REPORTS.

Marilyn L. Graves
Clerk of Court of Appeals

SUPREME COURT
OF WISCONSIN
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MARILYN L. GRAVES
CLERK

MARCH 12, 1991

TO: THOMAS M ROHE
OTJEN, VAN ERT, STANGLE,
LIEB & WEIR, S.C.
700 N. WATER ST., STE 800
MILWAUKEE, WI 53202-4206

RE: DISTRICT I
UNIVERSAL FOODS v. LIRC,
90_1734

(Opinion 2/12/91)

DEAR THOMAS M ROHE

THIS WILL ACKNOWLEDGE RECEIPT OF THE PETITION FOR REVIEW WHICH HAS BEEN FILED IN THE ABOVE MATTER PURSUANT TO SEC. 808.10, STATS. AND RULE 809.62 OF THE RULES OF APPELLATE PROCEDURE. PLEASE NOTE THAT THE CASE NUMBER AND THE DESIGNATIONS OF THE PARTIES WILL REMAIN IDENTICAL IN THE SUPREME COURT TO THE

DESIGNATIONS IN THE COURT OF APPEALS, OTHER THAN THE PARTY FILING THE PETITION FOR REVIEW SHOULD ADD PETITIONER TO THE PREVIOUS DESIGNATION. IF THE PETITION FOR REVIEW IS GRANTED AND ADDITIONAL BRIEFS ARE REQUIRED, THE BRIEFS WILL BE FILED PURSUANT TO RULE 809.19 [9] AND WILL THEREFORE HAVE THE SAME COLOR COVERS AS THE BRIEFS WHICH THE PARTIES FILED WITH THE COURT OF APPEALS.

BECAUSE THE COURT OF APPEALS MAY ON ITS OWN MOTION RECONSIDER ITS DECISION WITHIN 30 DAYS OF THE FILING OF A PETITION FOR REVIEW, WE WILL BE FURNISHING THE COURT OF APPEALS WITH A COPY OF YOUR PETITION FOR REVIEW.

IF YOU HAVE ANY QUESTIONS REGARDING PROCEDURES ON THE PETITION FOR REVIEW, PLEASE DO NOT HESITATE TO CONTACT THIS OFFICE.

YOURS VERY TRULY,

(signed)
MARILYN L. GRAVES
CLERK OF SUPREME COURT

CC: PRESIDING JUDGE, COURT OF APPEALS, DIST. 1
DANIEL J STANGLE
LOWELL E NASS
JAMES A BEAUDRY

COURT OF APPEALS
DECISION
DATED AND RELEASED

February 12, 1991

NOTICE

No. 90-1734

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

UNIVERSAL FOODS CORPORATION,

Plaintiff-Appellant,

v.

LABOR & INDUSTRY REVIEW COMMISSION,
and BARBARA DAMATO,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county: FRANCIS T. WASIELEWSKI, Judge. Affirmed.

Before Moser, P.J., Sullivan and Fine, JJ.

SULLIVAN, J. This is an appeal from a worker's compensation award.

Barbara Damato began working for the Universal Foods Corporation in 1983. Her pay, seniority, and conditions of employment were covered by a union labor agreement. Damato operated a packaging machine that required repetitive motions. Due to the repetitive motions, she suffered a compensable injury to her left wrist on November 15, 1984, for which she received worker's compensation and disability payments. Also on November 15, 1984, she was laid off due to lack of work, as was appropriate for her seniority status under the union contract. Her accumulated seniority amounted to just under one year due to other previous layoffs. The circuit court affirmed an order of the co-defendant, Labor and Industry Review Commission (LIRC), which reversed the administrative law judge's findings and dismissal order.

LIRC found, and the circuit court agreed, that Universal Foods Corporation was unreasonable in refusing to rehire Damato and liable to her for payment of lost wages pursuant to sec. 102.35(3), Stats. We affirm.

Universal asserts three issues on appeal: (1) whether sec. 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185 preempted LIRC from interpreting the collective bargaining agreement; (2) whether LIRC's findings are supported by sufficient evidence; and, (3) whether Universal was deprived of due process because of the lack of adequate notice as to the unreasonable refusal to rehire claim.

The appellate court's review of agency decisions is identical to the circuit court. West Bend Co. v. LIRC, 149 Wis. 2d 110, 117, 438 N.W. 2d 823,

826-27 (1989). Matters of law are reviewed de novo. Id. at 117, 438 N.W. 2d at 827. Findings of fact, however, are conclusive if supported by "any credible evidence." Id. at 117-18, 438 N.W. 2d at 827.

The first issue, whether Damato's sec. 102.35(3), Stats., claim is preempted by sec. 301(a) of the Labor Management Relations Act is a question of law. See id. at 117, 438 N.W. 2d at 827. Universal claims that Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) and 29 U.S.C. sec. 185(a) preempt LIRC's consideration of this worker's compensation claim because it requires the interpretation of a collective bargaining agreement.

Damato's claim is based on sec. 102.35(3), Stats., which states:

(3) Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to

seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

The applicable provision of the collective bargaining agreement states:

> 4.03: . . . Employees hired after May 1, 1969, and laid off who have more than five (5) years of seniority shall forfeit all seniority rights after 36 consecutive months of layoff, and all employees with less than five (5) years of seniority shall forfeit all seniority rights after twelve (12) consecutive months of layoff.

Damato had just under one year seniority at the time of layoff; therefore, she forfeited "seniority rights after 12

consecutive months of layoff," or November 15, 1985. Damato was given full release for work in July 1985. Based on the testimony in the record, LIRC found that a job was available within the one-year recall period and that Damato was not rehired. No interpretation of the collective bargaining agreement was necessary to make this finding. Hence, there is simply no preemption. As Lingle stated: "an application of state law is pre-empted by [sec.] 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement. " Lingle, 486 U.S. at 413 (emphasis added).

The second issue is whether LIRC's findings are supported by sufficient evidence. Because these are findings of fact, any credible evidence

is sufficient. West Bend, 149 Wis. 2d at 117-18, 438 N.W. 2d at 827. Even if contrary to the great weight and clear preponderance of the evidence, the findings will be upheld. Id. at 118, 438 N.W. 2d at 827.

To establish an employer's liability under sec. 102.35(3), Stats., the employee has the burden of showing: (1) that she was an employee; (2) that she sustained a compensable injury; (3) that she applied for rehire; and, (4) that the employer refused to rehire her because of the injury. West Bend, 149 Wis. 2d at 126, 438 N.W. 2d at 830-31. The burden then shifts to the employer to show a reasonable refusal to rehire. Id. at 123, 438 N.W. 2d at 829. In order to meet this burden, the employer must show: (1) that the employee could not do the work she applied for; and (2) that no

other suitable work was available. Id. at 126, 438 N.W. 2d at 831. Medical proof that an employee is unable to perform a job is necessary for the employer to sustain its burden. Id. at 126, 438 N.W. 2d at 830 . The second element need not be reached if the employer fails to establish, with medical evidence, the first element. See id. at 126, 438 N.W. 2d at 831.

The first two factors of Damato's prima facie case were not disputed. LIRC found the third and fourth factors were sufficiently established by the testimony in the record.

> It is the function of the commission, not the reviewing courts, to determine the credibility of witnesses, and it is for the commission to weigh conflicting testimony and

> decide who should be believed. Section 102.23(6), Stats. We are bound to accept the findings of the commission unless the evidence was insufficient or incredible as a matter of law.

Link. Indus., Inc. v. LIRC, 141 Wis. 2d 551, 558, 415 N.W. 2d 574, 577 (Ct. App. 1987). LIRC's determination that the employer's representative, Mr. Frederick, called Damato about a job in October 1985 was not incredible as a matter of law. Damato was released and available for the work as of July 1985. Just to be sure she cleared the work available in October with her doctor. However, as found by LIRC, Mr. Frederick "blocked her opportunity to show her ability to perform the offered work." LIRC then appropriately examined whether the

employer met the shifted burden of the other two factors. LIRC found no persuasive answer in the record why Mr. Frederick would call Damato to see if she was available to take a job if someone with her seniority was not up for recall. A job was found to be available and Universal presented no medical proof that Damato was unable to perform this job. Universal did not meet its burden. These findings are not insufficient or incredible as a matter of law. Just as the circuit court correctly "confirmed" LIRC's order, we do the same and uphold the factual determinations of LIRC.

Finally, Universal claims that it did not receive adequate notice of the phone call in October 1985 which was the basis for the unreasonable refusal to rehire claim. Therefore, Universal asserts that it was deprived of due

process. Supposedly, Universal was surprised by Damato's testimony taken before the administrative law judge about the October phone conversation with Mr. Frederick which evidenced Universal's unreasonable refusal to rehire. However, at the hearing, after Damato's "surprise testimony," Darrell Foell, Universal's director of labor relations, testified as follows:

> Q. [Attorney Beaudry, Damato's counsel, on cross-examination]: Now, you were present in this hearing when my client testified that Mr. Frederick called her in October of 1985 to come back to work?
>
> A. [Darrell Foell]: Yes.
>
> Q. Do you have any reason to dispute her testimony?
>
> A. Yeah, I do.

Q. What is your reason?

A. Well, when I heard it from Ms. Damato before, I called Mr. Frederick and asked him, and he said he never called her back.

Q. Now, Mr. Frederick is available to testify here today; isn't he?

A. I have no idea; he's a retiree.

If Mr. Foell, director of labor relations for Universal, knew about Damato's testimony early enough to call Mr. Frederick and ask him what happened, it could only have been Universal's choice not to present Mr. Frederick on rebuttal. In addition, there was timely notice of the hearing. The notice of hearing, received by Universal, as well as their counsel, indicated that the

"issue to be heard" was the "refusal to rehire 102.35(3)." Universal had actual notice of this issue. Their voluntarily inadequate or limited presentation to the tribunal does not amount to denial of due process . See, e.g., Riemer v. Riemer, 85 Wis. 2d 375, 377-78, 270 N.W. 2d 93, 95 (Ct. App. 1978).

LIRC's findings and conclusions, properly based on state law, sec. 102.35(3), Stats., are affirmed.

By the Court. -- Judgment affirmed.

Not recommended for publication in the official reports.

No. 90-1734

FINE, J. (dissenting). This is a state-law claim brought under section 102.35(3), Stats. Section 102.35(3) imposes liability on an employer who, "without reasonable cause[,] refuses to rehire an employe [sic] who is injured in the course of employment," provided it is determined that "suitable employment is available" for that employee. Section 102.35(3) also requires that "[i]n determining the availability of suitable employment ... the provisions of any collective bargaining agreement with respect to seniority shall govern." Pursuant to this command, the Labor and Industry Review Commission applied the collective bargaining agreement between Universal Foods Corporation and the union representing Barbara Damato in order to ascertain her rights under that agreement

and thus whether Universal Foods unlawfully refused to rehire her. The Commission determined from the collective bargaining agreement her accumulated seniority at the time of her injury and concluded that she had a one-year recall period. State-law claims between employees and employers that require the application of collective bargaining agreements are pre-empted by section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. sec. 185(a). I respectfully dissent from the majority's conclusion to the contrary.[1]

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[1]We must reverse if Damato's state-law claim against Universal Foods is pre-empted by section 301(a) of the Labor Management Relations Act. Accordingly, I do not discuss the other issues raised by Universal Foods on this appeal.

Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Although suits within the ambit of section 301(a) may also be brought in state court, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), section 301(a) pre-empts the application of state law "if such application requires the interpretation of a collective-bargaining

agreement," Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 413 (1986). The majority recognizes this, as it must. See majority slip op. at 3. Nevertheless, the majority holds Damato's state-law claim is not pre-empted by section 301(a) because, in the majority's view, "[n]o interpretation of the collective bargaining agreement was necessary" for the Commission to determine "that a job [for Damato] was available within the one-year recall period." Majority slip op. at 4. In essence, the majority holds that no interpretation was necessary because the collective bargaining provisions with respect to seniority are, in its view, unambiguous.

Putting aside the very real problem of when a contractual provision passes from the sun of clarity to the dusk of

ambiguity, the rule that the majority applies is not the test of pre-emption under section 301(a). The question is not whether a collective bargaining contract is ambiguous and thus requires "interpretation" but, rather, whether enforcement of the state remedy requires application of that contract. Lingle, 486 U.S. at 403-413. Thus, a state-law tort action brought by an employee for the alleged "bad faith" handling of a disability-insurance claim was pre-empted by section 301(a) because the insurance coverage was required by a collective bargaining agreement between the employer and the employee's union. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 216-218 (1985), reversing Lueck v. Aetna Life Ins. Co., 116 Wis. 2d 559, 342 N.W. 2d 699 (1984). Lingle, which specifically approved Allis-Chalmers, Lingle, 486 U.S.

at 405-406, reaffirms that section 301(a) prevents the states from applying their "individualized local rules when called upon to enforce" collective bargaining agreements, id., 486 U. S . at 404 n. 3, and that "'the pre-emptive force of sec. 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization,'" id., 486 U.S. at 406 n. 5 (quoting Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 23 (1983) (quoting section 301(a)). Thus, and with specific relevance here, a state-law claim is pre-empted by section 301(a) when resolution of that claim "is substantially dependent upon analysis of the terms of an agreement made between the parties." Allis-Chalmers, 471 U.S. at

220. Stated another way, a state-law claim with respect to rights within the ambit of a collective bargaining agreement is pre-empted by section 301(a) unless the state-law claim has a "method of measuring" or assessing the work-related facts at issue that is independent of the agreement. Johnson v. Beatrice Foods Co., 921 F. 2d 1015,_____, 1990 WESTLAW 197766 at 18-19 (10th Cir. 1990) (interpreting Lingle). Justice Donald W. Steinmetz's dissent in Lueck is instructive:

> Because any duty allegedly violated by Allis-Chalmers in the present case was specifically created by the labor contract, and would not exist absent such contract, it must fall within the ambit of sec. 301 of the Labor

> Management Relations Act (LMRA), which governs labor agreements. Without the existence of the labor contract conferring disability benefits upon union members, there can be no action in this case on a failure to pay such benefits. A finding of bad faith will necessarily be premised on a finding that a labor agreement, governed by federal law, has been violated. To do as the majority holds fragments deferral labor law.

116 Wis. 2d at 578, 342 N.W. 2d at 708 (emphasis in original). Similarly, here, the determination of whether "suitable employment," as that term is defined by section 102.35(3), was available for Damato requires an analysis and

application of the seniority rules in the collective bargaining agreement; there can be no finding that Universal Foods has violated section 102.35(3) without reference to that agreement. Since Damato's claim under section 102.35(3) in effect seeks to enforce the seniority provisions of the collective bargaining agreement, and since the claim's resolution is dependent upon the terms of that agreement, the claim is pre-empted by federal law. I would reverse.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

UNIVERSAL FOODS CORPORATION,

Plaintiff,

JUDGMENT

v.

Case No. 89-CV-014059

LABOR AND INDUSTRY REVIEW COMMISSION and BARBARA DAMATO,

Defendants.

The above action having come on for hearing before the Court, Universal Foods Corporation, plaintiff, appearing by Thomas M. Rohe, Barbara Damato, defendant, appearing by James A. Beaudry, and the Labor and Industry Review Commission, defendant, appearing by Donald J. Hanaway, Attorney General, by Lowell E. Nass, Assistant Attorney General; and the Court having considered the matter upon the record and written arguments of counsel, and having on the

10th day of July, 1990, rendered its written decision,

IT IS ORDERED AND ADJUDGED that the order of the Labor and Industry Review Commission, dated October 3, 1989, be, and same hereby is, in all respects confirmed.

Dated at Milwaukee, Wisconsin, this 25th day of July, 1990.

BY THE COURT:

—

(signed)
FRANCIS T. WASIELEWSKI
Circuit Judge, Branch 17

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

UNIVERSAL FOODS CORPORATION,

Plaintiff,

vs. Case No. 89-CV-014-059

LABOR AND INDUSTRY REVIEW COMMISSION AND BARBARA DAMATO,

Defendants.

MEMORANDUM DECISION

Nature of Proceedings

This is an action for judicial review, under sec. 102.23, Wis. Stats., of a workman's compensation order of the defendant, Labor and Industry Review Commission (hereinafter "LIRC") dated October 3, 1989, determining that the plaintiff, Universal Foods Corporation (hereinafter "Universal"), is liable to the defendant, Barbara Damato (hereinafter "Damato"), for the payment

of lost wages pursuant to sec. 102.35(3), Stats., and awarding Damato a certain sum as compensation for such lost wages. In so acting, the LIRC reversed the findings and dismissal order of the administrative law judge, (hereinafter "ALJ") dated April 21, 1989.

ISSUES

The court finds that the issues in contention between the parties have been properly defined by the LIRC, and therefore adopts the LIRC's statement of the issues, as its own, as follows:

1) Is there credible and substantial evidence to support the Commission's (LIRC) findings that the employer refused to rehire the claimant (Damato) without reasonable cause in violation of sec. 102.35(3), Stats.?

2) Is the claim under sec. 102.35(3), Stats., pre-empted by sec. 301(a) of the

Labor Management Relations Act where no interpretation of the collective bargaining agreement was required?

Applicable Statute

Section 102.35(3), Stats., provides:

> Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the

continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

Factual Background

The Court adopts the factual background, of Damato's work history with Universal, from the October 3, 1989 decision of the LIRC, as follows:

"The applicant (Damato) began working for the employer (Universal) in 1983. She operated a packaging machine and did repetitive work. Her pay, seniority and conditions of work were covered under a

union labor agreement. She suffered a compensable injury (left wrist carpal tunnel) with an injury date of November 15, 1984. Prior to this hearing, she received primary compensation payments for that injury and resulting disability. On November 15, 1984, she was laid off due to lack of work, as was appropriate under the union contract for workers with her seniority. The employer has not rehired her. The issue to be resolved is whether the employer unreasonably refused to rehire her, within the meaning of section 102.35(3) of the Statutes. . . .

> In October of 1985, the employer's representative, Mr. Frederick, called the applicant about a job which required lifting of 25 pounds. This was within the applicant's one-year union contract recall period, which did not expire until November 15, 1985."

Upon receiving this call from Mr. Frederick, Damato testified that she told Frederick that she would check with her doctor and call him back. That same day, after receiving the approval of her doctor to return to work, she called Frederick back to accept his offer of employment. However, Frederick said in reply that Universal did not need her anymore.

Standard of Review

In reviewing the decision of the

LIRC, this Court is bound by statute to uphold the factual findings of the LIRC if they are supported by substantial and credible evidence. Section 102.23 Wis. Stats. If there is relevant, credible and probative evidence upon which a reasonable person could rely upon to reach the conclusion made the LIRC, the LIRC's findings must be upheld. Princess House Inc. v. DILHR, 111 Wis. 2d 46, 54 (1983). The LIRC's determinations on issues of law are not binding on this Court, however, case law requires that legal determinations of the LIRC be upheld if the Court finds that such determinations are reasonable. Jenks v. Wisconsin Department of Industry Labor and Human Relations, 107 Wis. 2d 714 (Ct. App. 1982).

Decision

I. The first issue is whether the LIRC's

findings are supported by substantial and credible evidence. Before the LIRC, the plaintiff, Damato bore the burden of establishing a prima facie case by meeting the requirements of a four prong test: (1) that she was a statutory employee at the time of her injury; (2) that she suffered a compensable injury; (3) that she was able to return to work; and (4) that Universal refused to rehire her without reasonable cause.

Whether Universal was guilty of an unreasonable refusal to rehire Damato, pursuant to sec. 102.35(3), Stats., was a question of fact for the LIRC to decide. Link Industries Inc. v. LIRC, 141 Wis. 2d 551, 558 (Ct. App. 1987). That the first and second elements of Damato's prima facie case were established before the LIRC is not disputed.

The LIRC found that the third factor was established by the "medical opinions of Dr. Zupnik and Dr. Wartinbee, dated June and July of 1985, respectively, . . . that the applicant could perform the offered work." (LIRC 10/3/89 decision, at 3.) The LIRC found the fourth factor was established by the testimony of Damato. Based on her testimony that Frederick had called to offer her her job back, while she was still within the union contract's recall period, the LIRC concluded "that a job was available and that the applicant was up for recall under the union contract procedure. Otherwise, the conversation With Mr. Frederick would not have occurred." (Id. at 2.)

Thus, the LIRC determined that Damato had established her prima facie case. The burden then shifted to Universal to show some reasonable cause

for its refusal to rehire her. This Universal did not do. Universal contends that all Frederick was doing, when he called Damato, was checking on her health, not offering to rehire her.

In attempting to prove this contention, Universal relies upon the testimony of Mr. Darrell Foell, Universal's representative. According to Universal, Foell's testimony established "that employees with the applicant's seniority were not recalled by November, 1985, and indeed employees with more seniority than the applicant lost their seniority lost their seniority at the same time applicant did." (Universal's 1/19/90 brief at 9.)

The LIRC weighed this testimony against that of Damato and determined that Damato's testimony was credible. The credibility of a witness and the weight

to be given testimony, and reasonable inferences drawn from that testimony, are for the LIRC to determine. The Court may not substitute its judgment for that of the LIRC. Section 102.23(6), Stats. The LIRC found Damato's testimony credible is supported by substantial and credible evidence in the record. Therefore, even though evidence may have been presented by Universal that might lead to a different conclusion, this Court may not substitute its judgment on findings of fact made by the LIRC when the findings are supported by credible and substantial evidence, as is the case here.

The fact that conflicting evidence, on factual questions, was presented for a determination to the LIRC, is not a sufficient ground to overturn the findings of the LIRC. Eastex Packaging

Co. v. ILHR Department, 89 Wis. 2d 739, 745 (1979).

II. The second issue is whether Damato's sec. 102.35(3), Stats. claim is pre-empted by sec. 301(a) of the Labor Management Labor Relations Act. Damato contends her claim was not pre-empted, because the LIRC did not have to interpret the collective bargaining agreement (hereinafter "CBA"). Universal contends that her claim was pre-empted, because the LIRC interpreted the CBA, in reaching its decision. Universal argues the LIRC was precluded from interpreting the CBA, to grant Damato relief, pursuant to the holding of Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. __, 100 L.Ed. 2d 410, 422-3, 108 S.Ct. 1877 (1988).

The Court agrees with Universal that Lingle does preclude judges, and by

implication state agencies, from interpreting CBA's when determining questions of state law involving labor-management relations. According to Lingle, such interpretations remain "firmly in the arbitral realm. . . ." 100 L.Ed. at 422. Universal contends that it was necessary for the LIRC to interpret the CBA to reach its decision. Thus, because the LIRC exceeded its jurisdiction, by interpreting the CBA, Universal argues this Court must overturn the LIRC's determination.

Damato argues, and the Court agrees, that the LIRC did not have to interpret the CBA to reach its decision. Since the LIRC accepted the testimony of Damato, regarding her being called back to work, the LIRC did not have to construe the CBA to arrive at its decision. The LIRC did not interpret the CBA. And therefore no

pre-emption takes place. It is the opinion of the Court that the LIRC did not interpret the CBA in arriving at its determination. Therefore, Damato's state law claim was not pre-empted.

III. Universal has raised two additional issues it claims are determinative in this action for judicial review: (1) "Was the employer's right to due process violated by a lack of adequate notice?; and (2) Is a refusal to rehire an employee who loses her seniority under a collective bargaining agreement reasonable?" (Universal's 1/19/90 brief, at 5.)

(1) In sum, Universal contends that a "lack of adequate notice deprived the employer of due process." (Id. at 11.) Universal argues that it came to the hearing prepared to dispute Damato's allegations of an unreasonable refusal to

rehire in February of 1987, but that it was unprepared to dispute Damato's allegations of an unreasonable refusal to rehire in November of 1985. Universal argues that had it been put on proper notice, it would have produced Frederick, to refute Damato's testimony. If, as Universal claims, it was unfairly prejudiced and deprived of due process, that alone might be a sufficient ground for the Court to reverse the LIRC's determination, as Universal argues, citing Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 734 (1979).

However, the Court finds the Bituminous, case is distinguishable from the facts of this action, because there, the employer did ask for an opportunity to present evidence at the time of the hearing. That did not occur in the case at bar. Further, as Damato contends, and

the Court concurs, Universal's due process argument is without merit.

First, as clearly demonstrated by the record, Universal knew of the Frederick - Damato phone calls of October, 1985, before the hearing, but waived its opportunity for rebuttal by failing to produce Frederick at the hearing. Allen v. Allen, 78 Wis. 2d 263, 270 (1977). Secondly, even assuming Universal was surprised by Damato's presentation, it is well settled law, that, the right to any of the particular elements of a fair hearing may be waived. Appleton Electric Co. v. Minor, 91 Wis. 2d 825, 832 (1979). Finally, Universal, upon timely notice, voluntarily appeared and failed to ask for an adjournment to bring in Frederick for rebuttal testimony. Upon these facts, it is the opinion of the Court that Universal was

not denied its right to procedural due process. Riemer v. Riemer, 85 Wis. 2d 375, 377-78 (Ct. App. 1978).

(2) The second issue raised by Universal is also without merit. The LIRC did not base its decision on an interpretation of the CBA. Instead, the LIRC's decision was based primarily on the credible and substantial testimony of Damato.

Conclusion

It is the opinion of the Court that the LIRC's October 3, 1989 order is supported by credible and substantial evidence. Therefore, the entire order of the LIRC, in this matter, dated October 3, 1989 is CONFIRMED. Counsel for the defendant, LIRC, shall draw the appropriate order and submit it under the five (5) day rule.

Dated at Milwaukee, Wisconsin this 10th day of July, 1990.

(signed)
Francis T. Wasielewski.
Circuit Court Judge Presiding

BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

BARBARA DAMATO
14803 West National Avenue
New Berlin, Wisconsin 53151

Applicant,

Claim No. 84-57446
S. S. No. 378-68-2329

RED STAR YEAST PLANT
Universal Foods
325 North 27th Street
Milwaukee, Wisconsin 53208

Employer.

SEE ENCLOSURE AS TO TIME LIMIT ON FURTHER APPEAL.

On April 21, 1989, an Administrative Law Judge of the Worker's Compensation Division of the Department of Industry, Labor and Human Relations (hereafter the Department) issued a decision which dismissed the applicant's compensation claim for the employer's alleged refusal

to rehire her, within the meaning of section 102.35(3) of the Statutes. A timely petition for Commission review was filed on the applicant's behalf, pursuant to section 102.18(3) of the Statutes. An Answer to the petition was filed on behalf of the employer.

The Commission reviewed the record, applicable law and the written arguments of the parties. The Commission also consulted with the Administrative Law Judge regarding the credibility and demeanor of the witnesses. Based upon this review, the Commission majority determines that the Administrative Law Judge's decision should be reversed based upon the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The applicant began working for the employer in 1983. She operated a packaging machine and did repetitive

work. Her pay, seniority and conditions of work were covered under a union labor agreement. She suffered a compensable injury (left wrist carpal tunnel) with an injury date of November 15, 1984. Prior to this hearing, she received primary compensation payments for that injury and resulting disability. On November 15, 1984, she was laid off due to a lack of work, as was appropriate under the union contract for workers with her seniority. The employer has not rehired her. The issue to resolve is whether the employer unreasonably refused to rehire her, within the meaning of section 102.35(3) of the Statutes. The Commission majority determines that this question must be answered in the affirmative.

An applicant establishes a prima facie case by showing the following factors: (1) that she was a statutory

employe at the time of her injury, (2) that she suffered a compensable injury, (3) that she was able to return to work, and (4) that the employer refused to hire her. If these four factors are established, the burden shifts to the employer to show that either suitable work was not available which the employe could perform, or that the employer had reasonable cause not to rehire her.

The applicant established the four factors of her prima facie case. The first two factors were not disputed. The third and fourth factors were established by the following facts. In October of 1985, the employer's representative, Mr. Frederick, called the applicant about a job which required lifting of 25 pounds. This was within the applicant's one-year union recall period, which did not expire until November 15, 1985. The Commission

majority concludes that a job was available and that the applicant was up for recall under the union contract procedure. Otherwise, the conversation with Mr. Frederick would not have occurred.

The medical opinions of Dr. Zupnik and Dr. Wartinbee, dated in June and July of 1985, respectively, were that the applicant could perform the offered work. Sometime between July and November 27, 1985, the applicant's condition worsened because Dr. Olson performed a second surgery around that date in November. However, even considering that her condition worsened, the applicant still established her prima facie case. This is true because the employe offered to Mr. Frederick to clear the job opportunity through her physician, but Mr. Frederick did not allow her that

opportunity. He, in effect, blocked her opportunity to show her ability to perform the offered work.

The burden then shifted to the employer to show that suitable work was not available which the applicant could perform, or that the employer had reasonable cause not to rehire her.

The employer asserted that in October of 1985, the applicant's seniority was not sufficient for a recall. The Commission majority finds this reason pretextual. As discussed previously, if her seniority was not yet up for recall under the union contract, then why would Mr. Frederick call her for a job? There is no persuasive answer to this question in the record.

In conference with the Administrative Law Judge, the Judge expressed sympathy with the employer.

The Judge felt that if the applicant mentioned recurring problems to Mr. Frederick, then Mr. Frederick probably thought there was no use in attempting to place the applicant in the job, based upon Mr. Frederick's assumption that she probably could not perform the lifting required in the position. The judge also felt that the employer may have called the employe just to see how she was doing, rather than to offer work. The Commission majority sees no persuasive evidence in the record to support the Administrative Law Judge's suppositions. Furthermore, an employer has the burden of proving that the applicant was not able to perform the offered work. The employer does not meet this burden by simply assuming the applicant's inability to work, especially when the employer has refused to allow the applicant to consult

with her physicians to establish her ability to perform the offered work. Such unfounded assumptions by employers are precisely the type of conduct prohibited by the statute.

The applicant has lifting restrictions in effect today. However, work is available at the employer's business which she can perform. In consultation with the Administrative Law Judge, the Commission learned that the Judge agreed the record showed that the employer has work which the applicant would be able to perform, even with her current restrictions. Nonetheless, the Judge felt that since the applicant was not returned to work within her contract recall period, she had no entitlement to those jobs. The Commission, however, has ruled that the employer unreasonably refused to rehire the applicant during

her contract recall period. The employer has not shown that today the applicant would not be entitled under the union contract to the work which she can perform if the employer had not refused to rehire her in October of 1985. Therefore, the applicant's current physical condition provides no basis for denying or limiting compensation to which she would otherwise be entitled under section 102.35(3) of the Statutes.

As of January 23, 1989, (the date of hearing), the applicant still has found no other employment. She is, therefore, entitled to the statutory maximum of one year's lost wages. This amounts to $22,308. Her attorney is entitled to 20 percent of the amount awarded herein. Attorney's fees are thereby set at $4,461.60.

NOW THEREFORE, this

ORDER

That within 30 days of the date of this Order, the employer shall pay the applicant the sum of $17,846.40, and shall pay the applicant's attorney the sum of $4,461.60. This decision is being issued as a final Order only as to the issue resolved herein.

Dated and mailed at
Madison, Wisconsin, this
3rd day of October, 1989.

(signed)
Kevin C. Potter, Chairman

(signed)
Carl W. Thompson,
Commissioner

PAMELA I. ANDERSON, COMMISSIONER (dissenting)

I am unable to agree with the result reached by the majority herein and I dissent.

I agree with the Administrative Law Judge that the employer did not violate section 102.35(3). The employer testified that they did not get to the employe's seniority for the year the applicant was gone. This would be from November 1984 to November 1985. While I agree with the majority, it would have been very helpful to have Mr. Frederick at the hearing to testify about the October conversation, I do not believe it was crucial to establishing what work was available. Since they had not reached the applicant's seniority by November of 1985 when her recall rights under the contract ran out, then they also could

not have offered her work in October of 1985.

The majority assumes that the call from Frederick offered the employe a job, and then when she wanted to check with her doctor, Frederick said "never mind," we do not need you. The Administrative Law Judge believed that Frederick had called only to check on how the employe was doing. The Administrative Law Judge's opinion is more than sympathy for the employe where the employer testified that the employe did not have sufficient seniority for recall before November 15, 1985. After that date, the employe had lost her union recall rights which she did not even grieve. The employe also had additional surgery and more permanent restrictions on what she could do for the employer.

I am convinced that the employer did not unreasonably refuse to rehire the employe. For these reasons, I would affirm the Administrative Law Judge decision and deny the penalty of one year's wages.

(signed)
Pamela I. Anderson, Commissioner

cc: James A. Beaudry, Attorney
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STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS
WORKER'S COMPENSATION DIVISION
P. O. BOX 7901
MADISON, WISCONSIN 53707
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Respondent Attorney

Hearing was held January 23, 1989 in Milwaukee, Wisconsin.

APPEARANCES:
Applicant, in person, and by Attorney James A. Beaudry;
Respondent by Attorney Daniel J. Stangle of Otjen, Van Ert, Stangle, Lieb & Weir, S.C.

The applicant is making a claim against the respondent pursuant to sec. 102.35(3), Stats. It is based on a left wrist carpal tunnel work injury dated November 15, 1984. Respondent's insurance carrier paid compensation for temporary total disability November 15, 1984 to June 29, 1985 and from November 27, 1985 through at least July 7, 1986. Her claim for temporary total disability June 1985 to November 1985, plus disfigurement, was settled on a limited compromise order issued August 4, 1986. Her claim for permanent partial disability was settled by a compromise order dated February 23, 1988.

Upon the issue of failure to rehire, the Administrative Law Judge makes the following

F I N D I N G S O F F A C T

The applicant began working for respondent in 1983. She operated a packaging machine and did repetitive work. Her pay, seniority and conditions at work were covered under a union labor agreement. The applicant was laid off due to lack of work November 15, 1985 along with other workers with her seniority. Her accumulated seniority amounted to just under one year due to other, prior layoffs. The applicant and the other workers with her seniority were not recalled during the following year. The applicant's left wrist injury required medical treatment during the layoff. She received worker's compensation as set forth above. The medical restrictions the applicant was under due to the left wrist problem would have kept her from any work she was qualified for at the company had

work existed in 1985 and should work exist at present. The company terminated the applicant when her seniority ran out November 15, 1985. The applicant did not contest under the labor contract the company's act of counting worker's compensation leave as part of her layoff time. Due to the cessation of temporary total disability at the time of the termination (the subject of a later claim by the applicant against the insurance company,) the company was not aware that her status was anything other than layoff when the termination was made. Because of all these factors, the business decision to terminate the applicant at the expiration of her seniority was made with reasonable cause and was not in any way an act of discrimination due to the fact the applicant had incurred this work

Injury. The claim for benefits pursuant to sec. 102.35(3), is dismissed.

NOW, THEREFORE, this

O R D E R

That the pending claim made pursuant to sec. 102.35(3), Should be, and hereby is, dismissed.

Dated at Madison,
Wisconsin, this 21st day
of April A.D., 1989.

(signed)
Thomas R. Jones
Administrative Law Judge

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY,

LABOR AND HUMAN RELATIONS

Worker's Compensation Division

BARBARA DAMATO,

Applicant,

vs. W.C. NO. 84-57446

RED STAR YEAST PLANT,

Respondent,

TRANSCRIPT OF PROCEEDINGS

at

Milwaukee, Wisconsin

January 23, 1989

PRESIDING:

HONORABLE THOMAS R. JONES

ADMINISTRATIVE LAW JUDGE

BARBARA R. HOFFMEIER, RPR
OFFICIAL REPORTER

1984, and seven appears to be her termination entry that shows that she was terminated under the contract as of November 20, 1985. Is that the date of the termination, Mr. Stangle?

MR. STANGLE: The effective date is November 15th, Your Honor. If you would look at the third box from the left on the top line, effective date, November 15th, 1985.

JUDGE JONES: Okay. I have it. I'll just circle that with my blue pen. That's how it is on the exhibit now. So, those are received 1 through 7. Mr. Beaudry, how do you want to begin on your case?

MR. BEAUDRY: I would like to call the claimant as a witness.

BARBARA DAMATO, called for examination herein, after having been

first duly sworn by the Administrative Law Judge, was examined and testified as follows:

MR. STANGLE: Your Honor, just so it's preserved for the record, we have objected to the department's jurisdiction as we believe this case is pre-empted by Lingle vs. Norge and section 3.01 of the Federal Labor Management Relations Act.

JUDGE JONES: I'm familiar with that Federal case, but the last I heard it was reversed by the Supreme Court.

MR. STANGLE: That's not entirely accurate. The case was substantially circumscribed and your determination is dependent on your interpretation of the bargaining agreement.

JUDGE JONES: Maybe that's it. So far, the State of Wisconsin through its Worker's Compensation Division and

the Labor and Industry Review Commission has taken the position we can still hold the hearings on discharges. So, until they tell me different, I have to hold the hearings.

MR. STANGLE: I appreciate that. I would like the record preserved so I don't waive that on appeal.

JUDGE JONES: Mr. Beaudry, you can go ahead.

DIRECT EXAMINATION

BY MR. BEAUDRY:

Q State your name.

A Barbara Ann Damato.

Q What is your address?

A 14803 West National Avenue, New Berlin.

Q In 1984 you were employed by Red Star Yeast; is that correct?

A Yes.

Q And what was your job there?

(pages 9-11)

JUDGE JONES: Well, lets back up. I missed the date when she got her doctor's release. Ask that question again.

Q (By Mr. Beaudry) When did the doctor release you to return to work?

A Dr. Wartinbee, sometime in July, I believe. He told me I could try going back to work.

JUDGE JONES: July of what year, 1986?

THE WITNESS: No, I think it was '85. I'm not really sure.

JUDGE JONES: You first were off from November of '84 to June 29, 1985. Then you had your elbow surgery in November of '85?

THE WITNESS: Correct.

JUDGE JONES: So, thinking back-

THE WITNESS: It was June of '85.

JUDGE JONES: So you are saying you were released to return to work in late June of 1985?

THE WITNESS: Right. He told me I could try going back to work.

JUDGE JONES: Your doctor then was who?

THE WITNESS: Dr. Wartinbee.

JUDGE JONES: Pick it up from there, please.

Q (By Mr. Beaudry) Now, did you have a discussion with someone from Red Star Yeast about your returning to work?

A Yes, I did, with my boss.

Q What was his name?

A Bernie Frederick.

Q When was that discussion?

A That was in October of '85 when he called me in to ask me if I could come back to work.

Q What did you tell him at that time?

A I told him that knowing with the cramps I was still having in my arm, I would contact Dr. Wartinbee at the time to see what he thought. Bernie said I should give him a call. I called my doctor, and he said, "Go ahead and try it, and I called Bernie back, and he said, "Never mind, we don't need you." This was for returning to the bagger department, working in the bagger department.

Q Did you have any further discussion with him at that time?

A No. He just said I should stay in touch with him.

Q Now, did you have a discussion with him at a later time about returning to work?

A Yes, I did, in December of '85.

Q You spoke with Bernard Frederick; is that correct?

A Yes, I did.

Q What was the conversation that you had with him?

A Well, I had called him because I was told by an employee that I worked with that I was terminated, and I called Bernie, and I said, "Do you need me for work?" And he said, "No, you are terminated." And I said, "Why am I terminated?" He said, "Because you were on lay-off, and you weren't able to come back within a year's time from a lay-off." I said, "I wasn't laid off, I was injured." And he said, "You will have to take it up with your union," and he

wouldn't have any further conversation with me.

Q You agree that your gross wage at the time you were injured was $441.60 per week?

A Yes.

Q Were you willing to go back to work in October when you discussed it with Mr. Frederick?

A Yes, I was.

Q Are you aware of the fact that lower seniority employees returned to work at that time?

MR. STANGLE: Object, leading and suggestive, assumes facts not in evidence.

JUDGE JONES: Sustained.

Q (By Mr. Beaudry) Have you ever been called to work by them since that time?

A No.

Q I want to show you what's been marked as Respondent's

(pages 14-18)

A I don't recall any names, and I didn't write any down.

Q Was your second conversation with Bernie Frederick or was it with Darrell Foell?

A I spoke with Bernie Frederick.

Q You were a member of the collective bargaining agreement in November of 1984 and even as late as November of 1985?

A Yes.

Q You did file a grievance over your termination, didn't you?

A I didn't understand how to do it, and everybody I talked to told me to do something different, so I went to my attorney.

Q You had a different lawyer at that time?

A Yes, I did.

Q No legal action was started over your termination at that time, was there?

A No, he said he wouldn't touch it.

Q Do you remember being told by Darrell Foell that if you had any questions about the collective bargaining agreement that you should see your union representative?

A I did speak to a union steward. I don't recall his name, and he told me to contact my attorney.

Q Now, you never physically went back to Red Star Yeast or Universal Foods to resolicit employment, true?

A What do you mean by resolicit employment?

A You never went back to the premises to say, "Here I am, take me back to work;" did you?

A No, I did not. I was told I was fired.

Q Just answer the question I'm asking, please. If your lawyer has a additional questions, I'm sure he will be able to ask them.

You never went to Universal Foods or Red Star Yeast or brought in medical reports about your condition, did you?

A No, I didn't.

Q In fact, the worker's comp. carrier, Kemper Insurance, paid you disability payments as late as 1987; isn't that true?

A Into '87.

Q Right. And at the present time you have got permanent restrictions from Dr. Olson; isn't that true?

A Yes.

Q And what are those restrictions, Ms. Damato, as you understand them?

A I don't even remember.

Q Isn't it true that when Dr. Olson released you to return to work in 1986, he started you out with a two pound lifting restriction and said you could build up to five pounds?

A Yes, I do recall that.

Q He never increased the restrictions, has he?

A I never seen him to increase them.

Q So as far as Universal Foods and Red Star Yeast were concerned, if they were to take you back, they would have to provide you work that you wouldn't lift over five pounds; isn't that true?

A No, I would be willing to trying something else.

Q Do you think the company should try to give you work that's heavier than what the doctor told you you could do?

A I was willing to go back in October when Bernie called me. This was my job. I would be willing to try it.

MR. STANGLE: I have no other questions, Your Honor.

EXAMINATION

BY JUDGE JONES:

Q At the company you ran a machine that packaged the yeast?

A Yes.

Q Were you making those little foil packages that people see in supermarkets?

A Yes.

Q You did things like watch the machine and fill up the tray with packaging material?

A Yes.

Q And if there was a problem, you would call somebody?

A Yes, a problem with the machinery, we would have to call somebody.

Q A little problem like a jam-up, you knew how to --

A -- take care of it.

Q Was there lifting on that machine job?

A Some but not very much. They were teaching me how to run the scale before I got injured which involved a lot of lifting.

Q So the job you were on when you got your arm trouble was the scale job?

A No. It was the packaging, the repetitious one.

JUDGE JONES: Any redirect?

MR. BEAUDRY: Yes, I have one question.

REDIRECT EXAMINATION

BY MR. BEAUDRY:

Q In 1985, how did you contact Mr. Frederick about returning to work?

A In October of 1985?

Q Yes.

A I called him by phone. It was after he called me though I called him back.

Q And what was the type of work that you understood from your conversation with him was available to you?

A To work on the bagger.

Q That's the packaging machine you were on when you were hurt?

A No, this is a bigger bagger.

MR. BEAUDRY: That's all the questions I have.

JUDGE JONES: If he called you to ask about the bagger job, how is that that you didn't go back to that job; was something agreed between the two of you?

THE WITNESS: You mean when he called me to ask me to come to run the bagger?

JUDGE JONES: Right.

THE WITNESS: When I called him back, he said, "Never mind, we don't need you," after my doctor told me to go ahead and try running the bagger. The bagger is run with twenty-five to fifty pound bags, I believe. It's not like you are doing it alone. There is somebody there to help you, and I was more than willing to try.

JUDGE JONES: Anything more, Mr. Stangle?

MR. STANGLE: Not with this witness.

JUDGE JONES: If Mr. Beaudry wins benefits for you, he can get a twenty percent fee. Has he told you about that?

the state of Washington, Idaho, California, Maryland, Texas, Minnesota, New Jersey, Missouri, Indiana.

JUDGE JONES: I'll let Mr. Stangle ask the questions, but I want to know one thing: How is it that Mr. Bernard Frederick signed her termination notice? What was his position at the company?

THE WITNESS: Mr. Frederick was at the time in 1985 the production superintendent of the packaging department for the plant on Greves Street. He was her -- not her immediate supervisor -- or -- but he would have supervised Scott Burns (phonetic), Al Bop (phonetic), a variety of other front-line supervisors who would have directly been responsible for the packaging department, and as the production superintendent and

as the production superintendent of the packaging department he is responsible -- one of the responsible individuals for signing it. Bill Rutter is the plant manager and his name is also on the document.

JUDGE JONES: How do you spell that Rutter name?

THE WITNESS: R-u-t-t-e-r.

JUDGE JONES: What is Mr. Frederick's relationship with the company at this time?

THE WITNESS: He's a retiree.

JUDGE JONES: Is this Rutter still with the company?

THE WITNESS: Yes, Mr. Rutter is still the plant manager.

JUDGE JONES: Okay, you can continue Mr. Stangle.

Q (By Mr. Stangle) As director of labor relations, the personnel files and

work records are in your personal custody and control?

A Yes, sir.

Q At my request you reviewed Ms. Damato's personnel record and have it with you today?

A Yes, I do.

Q Were you able to determine whether or not she was subject to lay-off before her injury claim of November 15, 1984?

A Yes, sir. According to the file, she would have been handed a lay-off slip on November the 15th indicating that she was to be laid off at the end of that shift that day, and that is consistent with what took place with a number of other employees with seniority about the same length of time.

Q Were you able to find the names of any other individuals who were laid off on the same date?

A Yes, a Phil Sporansa (phonetic), Terry Sagrim (phonetic), Nancy Usoff (phonetic), in addition to a number of others. There are approximately eight to ten employees who were laid off on either November 15th or November 16th of 1984.

Q Mr. Foell, as director of labor relationships, you were familiar with the collective bargaining agreement that applied to the personnel at the Greves Street facility?

A Yes, sir.

Q You were involved with negotiations of that contract?

A I have been since November of 1978.

Q Is there any distinction made in the contract for individuals who are off work for more than a year for lay-off as opposed to industrial injury and personal illness?

A There certainly is, and there are a number of different distinctions that take place in the collective bargaining agreement under I believe it's section 4.03, an employee who has less than five years of service will lose his or her seniority upon being continuously laid off for twelve months and an employee with more than five years of service does not lose his or her seniority until they have been laid off for thirty-six months.

Q That has nothing to do with whether you are injured at work or not, does it?

A Strictly in relationship to lay-off due to lack of work.

Q Now, in Ms. Damato's case approximately how much did she actually work in 1983?

A Well, according to the records that we have, Ms. Damato worked for approximately six weeks in 1983 at which

time she was permanently laid off. She would not have achieved seniority at that point in time, but due to the way we handled operations of that nature, we do attempt to call people back to work if there is an opening so long as that individual would not have lost his seniority. In this case it would be twelve months of continuous lay-off. She was called back to work just short of losing her first several weeks of accumulation of work in October of 1984 and worked approximately four weeks at that time at which time she was again issued a notice of lay-off, and later on that same date reported that she had a problem with her arm, that was the last day of work.

Q In reviewing Ms. Damato's personnel file, were you able to come across any

return to work slips form any doctor whatsoever?

A None at all.

Q Now, we have had marked as exhibits 1 through 4 various doctor's reports including those from Dr. Zupnik, and you had occasion to review these in my office before the hearing, I believe, those particular copies, the copies of them, correct?

A Yes, that's correct.

Q Prior to today, Mr. Foell, did Universal Foods have any of those reports in its possession?

A Universal had none of these reports in its possession. They were obviously forwarded by Ann Hamptom (phonetic) who is an employee of Kemper our worker's compensation insurance carrier, and she did not forward them to us.

Q So even as late as today, there is no return to work slip from any doctor showing that this claimant is ever fit to work?

A That's correct. I was not aware of her ever being able to return to work.

Q Are there other individuals who were laid off at the time she was that lost their seniority and have been discharged?

A Yes, there's an individual named Phil Sporansa who was hired on January 9th of 1984 who lost his seniority on January 15th -- November 15th of 1985, the same date that Ms. Damato's seniority was terminated. Another employee named Colleen Korlakowski (phonetic) who had been laid off for a substantial period of time also in 1985. Colleen did not quite lose work due to being laid off for twelve continuous months. She was offered a return to work on or about November 1st

of 1985 and refused to return to work at that time and therefore lost her seniority, but there also was one other individual whose name I have forgotten at this point who lost her seniority at the same time.

Q Ms. Damato's seniority date was November 2, 1983?

A That's correct.

Q These other individuals that lost their jobs actually had more seniority than she did?

A That's not the case of Phil Sporansa. He did not, but the other ones did.

Q Had you had a conversation with Ms. Damato regarding potential -- or after November 15th of 1984?

A Yes, sometime in the middle of February of 1986 I received a call from Ms. Damato. She told me that she

understood that her name had been removed from the seniority list and she wanted to know why, and I responded to her at that time that her name had been removed because she had been on lay-off for twelve months and under the collective bargaining agreement a person with less than five years of seniority lost her seniority after twelve continuous months of lay-off, and she responded that well that wasn't right. She wasn't on lay-off, and I said, "Well, our record shows you were on lay-off, and if you disagree with it, you ought to contact Jay Caplan (phonetic) who is the president of the local union and talk to him."

Q You heard Ms. Damato testify about the physical restrictions given to her by Dr. Olson?

A Yes.

Q She testified the last time she saw Dr. Olson he restricted her to five pounds of lifting, true?

A Yes. I heard that.

Q Is there any work available for her at Universal where she would be restricted to five pounds of lifting?

A Well, the only conceivable job that I can think of that could be performed under those agreements where the person can't lift as much as five pounds would be in the packaging job that she had been working on at the time that she was injured, and even there, there's a serious question as to whether she would be able to do the job with a five pound weight restriction, but factually, our entry level job today is the bagger job and that job is one which results in quite a number of claimed injuries. It is bagging fifty pounds of crumbled yeast.

The first portion of the operation involves a wrist flexion to close the top of the bag and insert it into a heat sealing unit. That portion of the job is performed for twenty minutes. The individual then goes into the next portion of the job where they pick up fifty pound bags by themselves at a rate of four a minute and deposit them on a pallet, and you work at that for approximately twenty minutes and then you go to operate a fork-lift truck for approximately twenty minutes and then repeat the rotation throughout the day.

With a five pound weight restriction, there's no way that Ms. Damato could do that job.

Q With her seniority -- Lets assume that there wasn't a problem for a moment with the collective bargaining agreement and the discharge in November of 1985.

Lets assume for purposes of this question that she still is on the rolls as an employee. Under the collective bargaining agreement with her seniority of three months total work, is there any job that she could go to other than the bagger job?

A No, none at all.

Q That would be the the only one the collective bargaining agreement would allow you to put her in?

A That's correct. That wasn't the case in 1983 because the contract read differently in 1983. At that point in time we had two separate departments, the packaging department and the manufacturing department. The bagging operation was in the manufacturing department, and we hired individuals into the packaging department in 1983. In 1985 we did not because in our May 1985

contract negotiations we reached an agreement with the union that for hiring purposes the plant would be treated as having one seniority list and employees would have to come into the open job. The open job we have is a bagging job.

JUDGE JONES: This worker, Ms. Damato, are you saying that following one year after her November 15th, 1984 lay-off, she had not been recalled by the company?

THE WITNESS: That's correct.

JUDGE JONES: When did people of her seniority get recalled?

THE WITNESS: The first time that we had any recall for someone with her seniority was well into February of 1986. In fact, one of the individuals whose seniority date was November 1st of 1983, I believe it's Lisa Trapp (phonetic) was recalled and laid off and

on from July of 1985 through roughly June of 1986.

JUDGE JONES: Well, if you took some other employees back in February of 1986 who apparently had been off long enough to lose their seniority --

THE WITNESS: No.

JUDGE JONES: No?

THE WITNESS: No one had been off long enough to lose their seniority. We had some -- We had recalls in February of '86, that if these individuals had been on the seniority list yet they would have been eligible for recall at that time. What I'm saying, sir, is that Universal Foods Corporation in its yeast manufacturing division had some rather troubling times through 1985 and 1986 and employees like Lisa Trapp and Nancy Usoff and Terry Sagrim all individuals whose seniority dates were within roughly one

week of that held by Ms. Damato were recalled and laid off and recalled and laid off repeatedly during this period of time. It was not until June of 1987 that those individuals obtained more than roughly three months of work during any calendar year.

JUDGE JONES: But you are saying you didn't really have any recalls until February of 1986, right?

THE WITNESS: We had recalls in June, July, August, September, October, November, December, each one of these years -- months during this period of time, but those recalls lasted for a week at at time, very short periods of time. They typically were situations where somebody would be off with a worker's compensation claim, they would be off on vacation, they would be off on sick leave, and we needed one person to fill

in. So one of these people would be called back. However, we never got to the position where Barbara Damato would have been eligible for recall because she was too low on the seniority list. In fact, there were at least three people who lost their seniority about November 15th or November 16th of 1985 because they had been laid off for twelve months. Barbara Damato was not singled out or picked out of any group.

JUDGE JONES: Let me break in. I'm a simple guy. You have to answer short questions with me. You are saying up until the time of her termination there was never a recall specifically for Ms. Damato, right?

THE WITNESS: That's correct.

JUDGE JONES: And that was because you were -- the people you were recalling were ahead of her in seniority?

THE WITNESS: That's correct.

JUDGE JONES: You never happened to get to her?

THE WITNESS: That's correct.

JUDGE JONES: So a year goes by, and since she has been off a whole year, she was removed from the roll?

THE WITNESS: That's correct.

JUDGE JONES: That was that?

THE WITNESS: That's right.

JUDGE JONES: You didn't hire back other people after her who had been gone beyond their seniority time?

THE WITNESS: That's right, we did not.

JUDGE JONES: Anything more, Mr. Stangle?

MR. STANGLE: No.

JUDGE JONES: Mr. Beaudry.

CROSS-EXAMINATION

BY MR. BEAUDRY:

Q You indicate that Lisa Trapp -- Is she still an employee with your company?

A That's correct.

Q She was hired the same week that Barbara Damato was, correct?

A Lisa Trapp, if my name is correct, was hired the day before Ms. Damato was hired.

Q You mentioned three other people that were hired during that week that are still employees?

A Yes, Nancy Usoff and Terry Sagrim.

Q When was Nancy Usoff hired?

A I believe October 24th of 1983.

Q How about Terry Sagrim?

A I believe October 23rd of 1983.

Q Now, you were present in this hearing when my client testified that Mr.

Frederick called her in October of 1985 to come back to work?

A Yes.

Q Do you have any reason to dispute her testimony?

A Yeah, I do.

Q What is your reason?

A Well, when I heard it from Ms. Damato before, I called Mr. Frederick and asked him, and he said he never called her back.

Q Now, Mr. Frederick is available to testify here today; isn't he?

A I have no idea; he's a retiree.

Q If, in fact, she had gone back to work in October of '85, that would have extended her seniority an additional one year's time; is that correct?

A That's correct.

Q And ultimately she would have gotten probably partial call backs in the

following year that would have further extended it just like Lisa Trapp had?

A Well, based on what I know today, having seen these reports, I doubt that she would have been permitted to come back to work had Bernie called her back in because, just as Ms. Damato said, she would have had tc come back at the bagging job, and according to this, she had a five pound weight restriction. There's no way she could do the bagging job.

Q You were here when she answered that her doctor said she could try the bagging job?

A Yes, I heard that.

Q You just told us that this is the first time you saw these reports; is that correct?

A That's correct.

Q Isn't it fair to assume that her medical condition did not have anything to do with your decision to recall or not recall?

A Well, it is true her medical decision -- or condition had nothing to do with it. It was strictly a lay-off.

Q Especially those reports. You never saw them?

A That's correct.

Q If an employee is injured under your collective bargaining agreement and unable to return for a whole year, is their seniority terminated?

A No.

Q Their seniority is only terminated if there wouldn't have been work available for them; is that correct?

A That's correct.

Q Now, at this time there is approximately seven or eight people

working for Universal Foods that would have lower seniority than Barbara Damato; isn't that correct?

A If she had retained her seniority; that's correct.

Q Some of those people were laid off at the time she was and later called back?

A No, no these were all new hires.

Q When were they hired?

A Some of them were hired in 1986, some of them in 1987 - and again in 1988.

Q Now, when your employees are gone for more than a year on lay-off, isn't it, in fact, the case where you frequently call these people and ask them to return to work if they were good employees?

A We -- When we have employees who are on the seniority list, when their name comes up on the list to be recalled, they

are recalled whether they are good employees or not good employees because they have seniority, and they are entitled to be recalled at that point.

Q What about employees who have been laid off for a year and are off your seniority list but you concluded they were good employees when they did work, don't you phone them and ask them if they want a job back?

A No. We would be in violation of affirmative action rules and policies if they were to go about hiring from some private hiring list. We do all of our hiring of new employees from job applicants, and we do not retain people on a list for preferred hiring.

Q Even if they are outstanding employees, they are not -- just never going to come back to your company?

A They could come back to our company if they applied for employment.

Q Could Barb Damato return to your company if she had applied and her doctor authorized her to work?

A Barbara Damato as with anybody else who would apply for work and would seek employment, would be given every consideration and accordance with their ability to perform the duties of the job.

Q Why didn't you tell her that then in February of 1986 when you spoke to her?

A She didn't have a question about whether she could be hired at that point.

Q You didn't suggest that to her?

A I suggested that she contact Jay Caplan who is her union steward to deal with the question that she raised with me which is why was she taken of of the seniority list.

MR. BEAUDRY: That's all the questions I have.

3.02 Notice of permanent job vacancy shall be posted and the applicant with the greatest seniority shall receive the job vacancy, provided he is capable and qualified to perform the work. Jobs will be posted for a three (3) day period. Employees may place their names on a list which will be continuously available in the plant office for any job opening which may arise during any absences from work.

Whenever the phrase "capable and qualified" is used in this Article or elsewhere in this contract, the individual employee affected shall be entitled to a fair trial in performing the work, except in the following cases:

(a) Where he does not possess the proper license required on the job.

(b) Where the job requires mechanical skill, but he has not had

prior acceptable experience in that mechanical branch.

(c) Where he has a known handicap which might prevent him from performing the job satisfactorily or safely.

4.02 If further reductions are necessary in the department, then regular employees will be assigned or laid off in acordance with their seniority. The employee with the least seniority will be assigned or laid off first and so on in that order, provided the retained employees are capable and qualified of performing the remaining work.

In the event assignments are necessary to provide work for the more senior employees, the employee must accept the assignment or receive an optional layoff. This layoff will be considered as a regular layoff.

When a classification is reduced, employees in that classification by assignment shall be assigned out by seniority first. If a further reduction is necessary, it will be by seniority. The employee whose job is eliminated will be assigned to the job vacated by the least senior employee in that classification.

When a temporary job opening of one (1) week or more occurs in a classification, the most senior trained and capable employee who has been assigned out of that classification and retains job rights in that classification shall be assigned to the opening unless his job classification and shift is filled by assignment in which case he will be assigned to his own job and the employee he displaces will be assigned to the opening.

If a permanent job opening occurs and there is an employee working in the Plant with rights to that specific job classification and Shift, the employee will be returned to that job and the opening will not be posted.

4.03 Seniority shall be defined as length of service with the Company as determined by the employee's hiring date. Seniority shall not be subject to adjustment for regular layoff except for layoff of six (6) consecutive months, when seniority will no longer accumulate until recall. Seniority shall be subject to adjustment for leaves of absence in excess of forty-four (44) working days in any (1) one contract year for reasons other than illness, injury, military service, or union service.

An employee who quits or is discharged for cause shall forfeit all

seniority rights. Employees hired after May 1, 1969, and laid off who have more than five (5) years of seniority shall forfeit all seniority rights after 36 consecutive months of layoff and all employees with less than five (5) years of seniority shall forfeit all seniority rights after twelve (12) consecutive months of layoff.

4.05 When work is again available, employees will be recalled in the order of seniority. It is understood that employees to be rehired shall be notified by registered mail, or the equivalent, and if they fail to report for work within seventy-two (72) hours of notification, they shall be permanently removed from the payroll and shall forfeit all seniority. Any employee unable to report for work for good and sufficient reason within the required

seventy-two (72) hours of delivery of notice of recall to his last reported address, and who so notifies the Company within one hundred and sixty-eight (168) hours, shall be placed at the top of the recall list.

When an employee who has rights to a permanent job is recalled from layoff, or returns from jury duty, he will be assigned to his permanent job, if it exists, no later than the Monday shift of the following week.

ARTICLE 16

GRIEVANCES AND ARBITRATION

16.01 Where a grievance may arise by reason of an interpretation of this Agreement, the parties to this Agreement shall make all reasonable efforts to settle the same between them and in the following order and procedure:

(A) Step No. 1 A bona fide attempt shall be made to settle Such differences between the Union and the Company by the Shop Steward and the Supervisor of the particular division and shift affected. The Shop Steward must present the grievance to the Supervisor within seven (7) days of the alleged violation and the Supervisor, on receiving the grievance, shall process it immediately and give an answer to the Shop Steward within three (3) days.

(B) Step No. 2 If such difference is not satisfactorily settled, it shall, within three (3) working days after receipt of the Supervisor's answer in Step No. 1, be set forth in writing signed by the grievant and the Shop Steward and given to the Department Superintendent, or his designated representative, who shall discuss it with

the Shop Steward within two (2) working days after receipt of the grievance. The Superintendent, or his designated representative, shall give his written answer within three (3) working days after the meeting with the Steward.

(C) Step No. 3 If such difference is not satisfactorily settled by the Shop Steward and the Superintendent under Step No. 2, the matter shall be referred within three (3) working days to the Plant Manager, or his designated representative, and a grievance committee of the Local Union for the settlement of the difference. In the event they cannot agree within three (3) working days, after receipt of the issue, then the matter shall be referred to Step No. 4.

(D) Step No. 4 If the differences shall have been submitted,

but not adjusted under Step No. 3, either party may, within ten (10) working days after the final meeting under Step No. 3, request in writing that the differences be submitted to an impartial arbitrator mutually agreed upon by the Company and the Union. The decision of the arbitrator selected shall be final and binding on both the Company and the Union. The expenses of the arbitrator shall be shared equally by the parties. The arbitrator shall have no authority to modify, add to, subtract from or change any of the terms or conditions of this Agreement. By mutual agreement, the parties may waive any step of this procedure or extend the number of days to answer or move or appeal a grievance.

(1) The arbitrator shall meet promptly, the intent being to expedite the work at hand and to arrive at a

decision within thirty (30) days of the date the case was first submitted to the arbitrator.

(2) Should either side fail to comply with the request to arbitrate within the time specified, the party so failing shall forfeit its case.

(3) Employees shall not be locked out, cease work, walk out, or engage in any strike during arbitration and work shall continue under this Agreement.

still having in her arm, and stated that she would contact her doctor to see what he thought. Her doctor allegedly advised her to give it a try. When she called Mr. Frederick back, he allegedly stated, "Never mind, we don't need you," and told her to keep in touch with him. R. 8: 10, 22.

The employee never grieved her termination. R. 8: 14 lines 9-24.

On February 9, 1988, the employee filed an Application for Hearing claiming an unreasonable refusal to rehire in February 1987. The employer was never put on notice prior to hearing that an alleged refusal in October 1985 would be an issue. See Application for Hearing (Appx. p. 89).

IV. ARGUMENT

A. UNDER ALLIS-CHALMERS VS. LUECK AND LINGLE VS. NORGE, THE COMMISSION IS

PRE-EMPTED FROM ANALYZING COLLECTIVE BARGAINING AGREEMENTS, WHICH IT MUST DO TO DECIDE THIS CASE.

Since the pre-emption issue is a legal issue of first impression, the Court may decide it without deference to the decision of the LIRC. West Bend Company vs. LIRC, 149 Wis. 2d 110, 117, 438 N.W. 2d 823, 827 (1989).

Section 301 of the Labor Management Relations Act, 29 USC Section 185, precludes state agencies from analyzing, considering, or interpreting collective bargaining agreements. In Allis-Chalmers Corporation vs. Lueck, 47 US 202, 105 S. Ct. 2006, 85 L. Ed. 2d 120 (1985), the Supreme Court states:

> "We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an

agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, . . . or dismissed as pre-empted by federal labor-contract law."

47 US at 220.

Lueck further clarifies this doctrine as follows:

"(S)tate-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. . . . Our analysis must focus, then, on whether the Wisconsin tort action for the breach of the

> duty of good faith as applied here confers non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."
>
> 47 US at 213.

In Lueck, the Supreme Court held that Wisconsin's tort for bad faith handling of an insurance claim was pre-empted, since the obligation to make timely payment of benefits arose out of a collective bargaining agreement. A determination of this question would necessarily involve an analysis of the party's respective obligations under the collective bargaining agreement. Hence,

it was a question of federal contract interpretation, and was pre-empted by Section 301. 471 US at 215-6.

A close look at the Lueck case, and the above quotations, reveal that a state law cause of action is pre-empted by Section 301 whenever the determination of the claim requires an analysis or consideration of the terms of a collective bargaining agreement. Once a state court or administrative agency must look at a collective bargaining agreement to determine what it means, the cause of action is pre-empted.

The Lueck case was re-affirmed by the Supreme Court in the decision of Lingle vs. Norge Division of Magic Chef, Inc., 486 US 399, 405-6, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). In Lingle, the Supreme Court states:

"Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; Judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements."

486 US at 411

In Lingle, the Supreme Court held that an action brought under the retaliatory discharge provision of Illinois' worker's compensation statute was not pre-empted by Section 301. In order to show a retaliatory discharge under the statute, the plaintiff has to show (1) that he was discharged or threatened with discharge and (2) that

the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the worker's compensation statute or to interfere with his exercise of those rights. See Lingle vs. Norge, supra, 486 US at 407; Horton vs. Miller Chemical Company, 776 F. 2d 1351, 1356 (7th Cir. 1985). The Supreme Court reasoned that each of these purely factual questions pertained to the conduct of an employee and the conduct and motivation of the employer. Neither of the elements required a Court to interpret any term of a collective bargaining agreement. Likewise, in order to defend against the retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge. This factual inquiry also did not turn on the meaning of any provision of a collective

bargaining agreement. Hence, the state law remedy under Illinois' retaliatory discharge law was independent of the collective bargaining agreement in the sense of "independent" that matters most for Section 301 pre-emption purposes: resolution of the state-law claim did not require construing the collective-bargaining agreement. Lingle vs. Norge, supra, 486 US at 407.

Lingle made clear that where all of the factual issues in a case can be determined without reference to the collective bargaining agreement, the state law cause of action was not pre-empted by Section 301.

The cause of action in this case, under Section 102.35(3), Wis. Stats., is much more similar to the cause of action in Lueck than the cause of action in Lingle: a consideration of the

collective bargaining agreement is necessary to resolve the cause of action. Section 102.35(3), Wis. Stats., explicitly indicates that the provisions of a collective bargaining agreement shall govern, when determining the availability of suitable employment for an injured worker:

> "In determining the availability of suitable employment . . . any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern."
>
> Section 102.35(3), Wis. Stats.

In unreasonable refusal to rehire cases, the employee has the burden to establish (1) that he/she was an

employee; (2) that he/she sustained a compensable injury; (3) that he/she had applied for rehire; and (4) that the employer refused to rehire him/her because of the injury sustained at work. West Bend Company vs. LIRC, 149 Wis. 2d 110, 126, 438 N.W. 2d 823 (1989). The employer has the burden to prove (1) that suitable work was not available within the claimant's mental and physical conditions, West Bend, 149 Wis. 2d at 126, and/or (2) that the employer had reasonable cause not to rehire the employee. West Bend Company, 149 Wis. 2d at 123.

In this case, the employer specifically tried to prove that there was no suitable work available to the applicant under the terms of the collective bargaining agreement. R. 8: 23-28. In such a situation, the statute

specifically indicates that the terms of the collective bargaining agreement shall govern. Section 102.35(3), Wis. Stats. Hence, the Commission was required to analyze and consider the terms of the collective bargaining agreement in coming to its conclusion as to whether there was an unreasonable refusal to rehire.

As it was required to do, the Commission did analyze the collective bargaining agreement in coming to its decision in this case. The language used by the Commission in its written opinion, makes this very clear:

> "This was within the applicant's 1-year union contract recall period, which did not expire until November 15, 1985. The Commission majority concludes that a job was available and that the

applicant was up for recall under the union contract procedure. . . .

The Commission, however, has ruled that the employer unreasonably refused to rehire the applicant during the contract recall period. The employer has not shown that today the applicant would not be entitled under the union contract to the work which she can perform if the employer had not refused to rehire her in October of 1985."

Decision of LIRC, p. 2, 4.

The Commission analyzed the terms of the collective bargaining agreement and determined that the applicant had a 1-year recall period, which did not expire until November 15, 1985. The Commission

also indicates that it would have been open to further evidence as to whether the employee would have been entitled under the union contract to a job, if the employer had not refused to rehire in October 1985. In other words, the parties were litigating, and the Commission was deciding, what the employee's rights were under the collective bargaining agreement. Section 301 of LMRA, as interpreted by Lueck and Lingle, specifically prohibits this sort of decision making by a state administrative agency.

In addition, the Commission implicitly, although not explicitly, decided many other legitimate questions under the collective bargaining agreement. The Commission appears to have held: (1) that the employee was on lay off status at the time of the

termination; (2) that the Article 4.03 provision, concerning loss of seniority, applies to employees who are both laid off and suffering from an industrial injury; (3) that Article 4.03 applies to employees who cannot return to work because of restrictions; (4) that the employer can be considered as having violated the collective bargaining agreement even when an employee fails to grieve the alleged violation; and (5) that the applicant had enough seniority under the collective bargaining agreement to be recalled vis-a-vis other employees. All of these require an analysis, consideration, and interpretation of the collective bargaining agreement to determine how to apply that agreement to the facts of the case.

The Court of Appeals held that no interpretation of the collective

bargaining agreement was necessary to decide this case, and therefore, it was not pre-empted by Section 301 of LMRA. The reasoning of the Court of Appeals is as follows:

> "Damato had just under one year seniority at the time of lay off; therefore, she forfeited 'seniority rights after 12 consecutive months of lay off', or November 15, 1985. Damato was given full release to work in July 1985. Based on the testimony in the record, LIRC found that a job was available within the 1-year recall period and that Damato was not rehired. No interpretation of the collective bargaining agreement was necessary to make

this finding. Hence, there is simply no pre-emption."

Slip op. p. 4.

In other words, after analyzing, considering, and interpreting the terms of the collective bargaining agreement, the Court of Appeals determines the applicant's rights thereunder, and then indicates that no interpretation of the collective bargaining agreement is necessary. The Court of Appeals implicitly holds that as long as the terms of the collective bargaining agreement are unambiguous, and can be readily discerned from a review of the collective bargaining agreement, no interpretation is necessary to decide the case. In coming to this decision, the Court of Appeals relies upon Lingle. However, Lingle does not stand for this

proposition. The Court of Appeals applied the wrong standard.

The Court in Lingle held that the cause of action was not pre-empted in that case, because the factual issues involved could be resolved without an analysis or consideration of the terms of the collective bargaining agreement. Lingle, supra, 486 US at 407. Lueck makes clear that if the determination of a state law cause of action requires an analysis or consideration of the collective bargaining agreement, it is pre-empted:

> "Our analysis must focus . . . on . . . whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract . . . .

> We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, . . . or dismissed as pre-empted by federal labor-contract law."
>
> Lueck, supra, 471 US at 213, 220. (emphasis added)

Lueck also makes clear that whenever a state cause of action depends upon terms which the parties may voluntarily waive or alter by a collective bargaining agreement, it comes within the pre-emption doctrine:

> "Therefore, state-law rights and obligations do not exist

> independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements . . . .
>
> Therefore, under Wisconsin law it appears that the parties to an insurance contract are free to bargain about what 'reasonable' performance of their contract obligation entails. That being so, this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law."
>
> Lueck, 202 US at 213, 217.

In our case, the Commission and the Court of Appeals acknowledge that the decision depends upon the fact that the

applicant had a 1-year recall period, which did not expire until November 15, 1985. This is a right which can be voluntarily altered or waived by agreement of the private parties. Similar to Lueck, the parties here can negotiate over what is "reasonable" with respect to terminations. Under Wis. Stats. Section 102.35(3), whatever agreement the parties come to with respect to this question must be applied by the Commission in determining whether there is an unreasonable refusal to rehire. This is prohibited by Lueck.

There is absolutely nothing in Lingle, which overrules any portion of Lueck. Lingle involved a case in which the state law claim could be fully litigated without an analysis, consideration or interpretation of the collective bargaining agreement. That is

not the case here. In order to decide this Section 102.35(3) claim, the Commission was required to consider, analyze, and interpret the terms of the collective bargaining agreement. This is prohibited by Lueck and Lingle.

The standard applied by the Court of Appeals also is in conflict with case law from the Federal Courts of Appeals, which have dealt with the same issue. In Johnson vs. Beatrice Foods Company, 921 F. 2d 1015 (10th Cir. December 10, 1990), the Court held that a tort action for intentional infliction of emotional distress under Oklahoma law was pre-empted by Section 301 of LMRA. The plaintiff in Johnson alleged that the employer's conduct, which allegedly included discipline, suspension, and harassment, was outrageous. The Court reasoned:

"We interpret the Oklahoma law to mean that all aspects of Johnson's employment, including the terms of the CBA, must be considered when evaluating whether Beatrice's conduct was outrageous. We therefore agree with the District Court that it cannot be determined whether Beatrice's conduct was outrageous without determining whether the conduct was allowed under the CBA."

921 F. 2d at 1020.

The claim was pre-empted, because Oklahoma's tort for intentional infliction of emotional distress did not create an independent method of measuring when an employer's work-related conduct was outrageous. 921 F. 2d at 1021.

Under Johnson, if a decision maker must determine whether alleged conduct was allowed under the collective bargaining agreement, it is sufficient to come within the pre-emption doctrine. In this case, the Commission specifically determined what the employer's responsibilities were under the collective bargaining agreement. It determined that a job was available to the employee within her restrictions within the union recall period. Decision of LIRC, p. 2, 4. This is exactly the type of determination which was considered to be pre-empted in Johnson. A state court or agency cannot determine whether a certain action is allowed or required by the collective bargaining agreement without running afoul of the pre-emption doctrine under Section 301.

In addition, Johnson re-iterates that where the determination of a state cause of action requires a consideration of the terms of the collective bargaining agreement, it is pre-empted. The decision making process of the state agency or court must be completely independent of the terms of the collective bargaining agreement, for there to be no pre-emption. 921 F. 2d at 1020-1021. Since Wis. Stats. Section 102.35(3) specifically indicates that the terms of a collective bargaining agreement must govern, there is no method of measuring an employer's work-related conduct independent of the collective bargaining agreement. Under Johnson, this case would be pre-empted.

In Sluder vs. United Mine Workers of America, 892 F. 2d 549 (7th Cir. 1989), the 7th Circuit held that an employee's

state action against his union for personal injuries, allegedly caused by the union's failure in its duty to properly make safety inspections, was pre-empted by Section 301. In holding that the action was pre-empted, the 7th Circuit stated:

> "In our view, it would not be possible to define, with the precision demanded by Illinois law, the scope of the union's duty without reference to the collective bargaining agreement that governs the relationship between the company and the union. Indeed, the necessity for such a reference is evident from the complaint itself. . . . The collective bargaining agreement and the dispute resolution process established

under that agreement set forth the circumstances under which such action by the union would be permitted."

892 F. 2d at 554.

"(T)he allegations set forth in Counts I and II of the complaint can be resolved only by defining the precise nature of the duty assumed by District 12, and that duty can be defined only by reference to the collective bargaining agreement."

892 F. 2d at 555-6.

In Sluder, the 7th Circuit makes clear that if the determination of a state law action requires reference to a collective bargaining agreement, the action is pre-empted. In this case, the Commission refers to the collective

bargaining agreement a number of times. Decision of LIRC, p. 2, 4. The requirement to look at the collective bargaining agreement to determine the union's duty in Sluder is the same as the requirement to look at the collective bargaining agreement to determine the employer's duty under Section 102.35(3), Wis. Stats. Such analysis is prohibited.

Similar decisions were rendered by the 8th and 9th Circuits in Harris vs. Alumax Mill Products, Inc., 897 F. 2d 400 (9th Cir. 1990) and Hanks vs. General Motors Corporation, 859 F. 2d 67 (8th Cir. 1988). In Harris, the employee's claim was pre-empted, because it required an analysis of the collective bargaining agreement. 897 F. 2d at 403. In Hanks, the claim was considered to be pre-empted because an assessment of the claim and the employer's actions would be

impossible without reference to the collective bargaining agreement, a task exclusively within the realm of the arbitrators. 859 F. 2d at 69.

In Jackson vs. Liquid Carbonic Corporation, 863 F. 2d 11 (1st Cir. 1988), the Court held that an employee's state cause of action for invasion of privacy was pre-empted under Section 301 of LMRA. The employee had been discharged for failing a drug test, and the employer relied upon the management rights clause of the collective bargaining agreement as a defense. The Court indicated that in determining whether the drug test which Jackson was subjected infringed his right to privacy under state law, the single most important consideration was whether the test was "reasonable" in light of the circumstances. 863 F. 2d at 118. The

Court held that Jackson's privacy claims could only be resolved by deciding whether the employer's conduct was "reasonable" under the labor contract, taking into account the "expectations of the parties". It held that this is quintessentially a matter of federal law. 863 F. 2d at 119. Only by probing the contours of the collective bargaining agreement could one determine whether the drug testing program was legitimately implemented. Hence, the privacy cause of action was pre-empted. Id. Jackson indicates that if the determination of a state law claim requires scrutinizing, 863 F. 2d at 118, evaluating, Id., studying, 863 F. 2d at 120, or taking account of, 863 F. 2d at 121, the collective bargaining agreement, it is pre-empted.

In our case, the Commission studied, evaluated, scrutinized, and took into account the collective bargaining agreement to come to its conclusion that the alleged October 1985 phone call came within the contractual recall period. The Commission had to take the collective bargaining agreement into account. The statute requires that the terms of a collective bargaining agreement govern when there is a dispute as to the availability of work to a previously injured employee. Wis. Stats. Section 102.35(3). The Supreme Court decisions in Lueck and Lingle, and the Federal Appellate decisions interpreting these two cases, mandate that such a consideration of a collective bargaining agreement is sufficient to bring the state cause of action within the pre-

emption doctrine. The Court of Appeals applied the wrong standard.

This case is an excellent candidate for Supreme Court review. The decision of the Court of Appeals is in conflict with controlling opinions of the United States Supreme Court, namely Allis-Chalmers Corporation vs. Lueck, 471 US 202, 105 S. Ct. 2006, 85 L. Ed. 2d 120 (1985) and Lingle vs. Norge Division of Magic Chef, 486 US 399, 108 S. Ct. 1877 100 L. Ed. 2d 410 (1988). The decision also conflicts with several decisions from the various Federal Courts of Appeal, including a 7th Circuit decision in Sluder vs. United Mine Workers of America, 892 F. 2d 549 (7th Cir. 1989). This question is a novel one of first impression, the resolution of which will have statewide impact. There are probably dozens of cases presently

pending before the Department of Industry Labor & Human Relations, the Labor & Industry Review Commission, and the various courts, which involve unionized employees who have brought claims under Wis. Stats. Section 102.35(3). All of these cases will be affected by the manner in which the Supreme Court decides the Section 301 pre-emption issue. This is a question of law of a type that is likely to recur unless resolved by the Supreme Court. In addition, this case gives the Supreme Court an opportunity to develop, clarify, and harmonize the law by mandating a new doctrine to give the administrative agencies and courts guidance as to the circumstances in which a Section 102.35(3) claim should be considered pre-empted by Section 301 of LMRA. This case fits the purpose of the

Supreme Court, as defined by Wis. Stats. Section 809.62(1).

B. SUPREME COURT REVIEW IS ALSO APPROPRIATE ON THE ISSUE OF SUBSTANTIAL AND CREDIBLE EVIDENCE.

In this case, the employer produced evidence that the employer had not recalled a sufficient number of employees to get to employees with Ms. Damato's seniority prior to November 15, 1984, when her rights as an employee terminated. R. 8: 23-27. There is uncontradicted testimony that Colleen Korlakowski and one other employee had more seniority than Ms. Damato, and were laid off at the same time as her. R. 8: 26-27. There is absolutely no evidence submitted by the employee to the contrary. Nowhere in the alleged October 1985 phone call between the employee and Bernard Frederick did the employer

indicate that the applicant's seniority was sufficient to allow her to come back to work. R. 8: 10, Lines 6-19. Nevertheless, the Commission held, without any evidence, that the applicant was up for recall under the union contract procedure. Decision of LIRC, p. 2, 4. The Commission and the Court of Appeals find no persuasive answer in the record as to why Mr. Frederick would call Ms. Damato if someone with her seniority was not up for recall. Decision of Court of Appeals, p. 6., Decision of LIRC, p. 2. However, neither tribunal explains why Frederick, with knowledge of Damato's

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No. 91-101

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Supreme Court of the United States
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UNIVERSAL FOODS CORPORATION,

Petitioner,

v.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and BARBARA DAMATO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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RESPONDENT DAMATO'S MEMORANDUM IN OPPOSITION

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13pp

QUESTION PRESENTED

Does section 301 of the Labor-Management Relations Act preempt a state administrative agency from holding that an employer improperly refused to re-employ a worker following recuperation from her on-the-job injury, and from deciding, without interpreting or applying a collective bargaining agreement, that the employer's invocation of that agreement was merely a pretext ?

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STATEMENT

Beginning in !983, respondent Barbara Damato was employed as a packing machine operator by petitioner Universal Foods Corporation.[1] On November 15, 1984, she suffered work-related carpal tunnel syndrome in her left wrist and obtained workers compensation benefits for the injury and her resulting disability. Simultaneous with respondent's injury, petitioner initiated a layoff of employees, and selected the employees to be laid off by seniority, as required by the collective bargaining agreement

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[1]. This memorandum refers to the respondent Damato as "respondent," and to respondent Wisconsin Labor and Industry Review Commission as "the Commission."

("CBA") between petitioner and a brewery workers local union. Respondent was one of the employees included in the layoff, the propriety of which is not contested.

According to her testimony, which was credited by the Commission, less than a year after her injury and layoff, in October 1985, respondent received a telephone call from her former supervisor, Bernie Fredrick, who advised her that a job was available and asked whether she was able to return. Respondent indicated that she wished to consult with her doctor first, and, after the doctor told her she should try the job, she called back to accept the offer of reemployment. Petitioner's agent Fredrick then told her that she was not needed.

On February 9, 1988, respondent complained to the Commission that petitioner had violated the Wisconsin workers compensation laws Wis. Star. § 102.35, which forbids discrimination against workers compensation claimants. Subsection 3 requires employers to rehire employees who are injured in the course of their employment, when suitable employment is available within the employee's abilities. Petitioner defended on the grounds her seniority had expired an November 15, 1985, citing the CBA, which provides that employees of less than five years would lose their seniority rights when they had been laid off for more than one year, and pointing to a proviso of section 102.35(3), which provides that the seniority provisions of any CBA would govern determinations of the availability of suitable employment. In support of this contention, petitioner offered the testimony of a

manager to the effect that two employees with more seniority than Damato, who had also been laid off on November 15, 1984 had similarly lost their seniority on november 15, 1985.

An administrative law judge upheld this defense, Appendix to the Petition for a Writ of Certiorari ("Pet. App.") A66-A71, but the commission reversed. Id. A53-A65. It held that Fredrick's telephone call established thet there were jobs available for respondent within the year following her injury, Id. A56-A57, and that petitioner had acted inproperly in refusing to make this job available to Damato simply because she had insisted upon checking with her doctor before accepting the offer. If. A57-A58. Petitioner's reliance on respondent's seniority, and on the seniority provisions of the CBA, was firmly rejected: "The Commission majority finds this reason pretextual. " Id. A58. The majority further rejected petitioner's assertion that there was no "suitable" employment available on the ground that petitioner had failed to carry its burden of proof on that question at the hearing. Id. A59-A60. Accordingly, respondent was awarded one year of back, the statutory maximum. Id. A62. One commissioner dissented, arguing Fredrick had never really offered respondent a position and that petitoner's refusal to offer her a job after contractual recall rights expired was not unreasonable. Id A63-A65.

Petitioner then sought review of the agency's decision in Wisconsin Circuit Court, which upheld the back pay award. Id. A35-A52. According to the court, respondent established a primea facie case by showing that she was an employee at the time of injury,

that she suffered a compensable injury, that she was able to return to work, and that, based on her testimony about the telephone call from Fredrick, petitioner had unreasonably refused to hire her. Id. A42-A43. Thus, the court ruled, the burden shifted to petitioner to show reasonable cause for not hiring her. Although petitioner argued that Fredrick was really just checking on Damato, not offering her a job, and that its own witness has shown that no jobs were available, the court held that was really a factual question -- was there a job available for respondent in October, 1985 ? Id. A43-A44. That factual question, the court decided, had been resolved by the Commission in weighing the credibility of the two opposing witnesses, and questions of credibility, weight of testimony, and the inferences to be drawn from testimony may not be reweighed by the courts, so long as there was substantial evidence to support the decision. Id. A44-A45. Moreover, the court rejected petitioner's preemption argument, noting that, because the Commission had accepted respondent's testimony about the October, 1985 telephone call, it had not been necessary to interpret the CBA. Id. A47-A48

Petitioner appealed to the Wisconsin Court of Appeals, relying both on the contention that there was insufficient evidence to sustain the decision, and on the claim that the application of the state law to Damato's case was preempted because the Commission was "required to interpret[the CBA] in this case." Petitioner's Court of Appeals Brief, page 1. In the portion of its brief that addressed the preemption question, petitioner presented a long list

of contractual issues which, petitioner contended, had to be resolved before the Commission would decide whether a job was available to be offered to respondent. Id. 10-11. Thus, petitioner argued, even if one of its supervisors did offer respondent a job, the offer might have been contrary to the contract, and thus not required by state law; accordingly, petitioner hypothesized, only by construing the contract could the Commission decide whether state law had been violated. d. 11-13.

In the portion of its brief that addresses the state law questions, however, petitioner acknowledged that the agency had found, solely on credibility grounds, that it had retaliated against Damato exercising her rights under the workers compensation scheme, and its argument against that finding did not mention the CBA at all. Id. 14-17.

The court of appeals affirmed. Pet. App. A10-A23. It agreed with the circuit court that, on the facts of this case, there had been no need to interpret the CBA in order to decide that petitioner had a job available in October 1985 and that Damato had been denied this jib. Id. A16. One judge dissented on the ground that the one-year employment period had itself been derived from the CBA, and that this reference to the CBA, even though it was derived from petitioner's own arguments and even though it was wholly undisputed, was sufficient to preempt the state agency's application of state law. Id. A27. Petitioner then sought discretionary review in the Wisconsin Supreme Court, which denied review without comment. Id. A1-A2.

REASONS FOR DENYING THE WRIT

The Question of Whether Section 301 Preempts Some Claims Under the Wisconsin Workers Compensation Retaliation Statute Is Not squarely Presented Here, Because the Courts Below Found It Unnecessary to Consider the Meaning of the CBA on the Facts of This Case.

1. In the trial and intermediated appellate courts, petitioner focused its preemption claims on the facts of this case, as petitioner asserted them to be, contending that the propriety of its treatment of Damato herself could not be evaluated without deciding a number of questions under the contract. In its petitions for discretionary review in the Wisconsin Supreme Court and for Certiorari in this Court, however, the questions presented no longer depend on the need to interpret the CBA in order to decide this case. Petitioner has subtly shifted ground, mounting what is essentially a facial attack on the statute requiring the re-employment of workers who suffer on-the-job injury, based on the statute's explicit recognition of the fact that a CBA may often speak to the question of whether a job is "available" for the injured worker. The reason for this change is evident: both the agency and the lower courts decided that, whatever the CBA may actually mean, the CBA was invoked here as a pretext for depriving respondent of employment, and so petitioner's violation of state law does not depend on the meaning of the CBA.

Thus, in its briefs below, petitioner expressly recognized that the agency and trial court had decided that the question of whether petitioner had discriminated against respondent

turned on determinations of the credibility of the two witnesses who testified at the agency hearing, and on the drawing of an inference from the telephone call from respondent's supervisor that, whatever the contract may have provided, petitioner had a job available for respondent which it refused to give her once she insisted upon checking with her doctor. Petitioner objected strenuously to the proposition that the case could be decided on such grounds, instead of looking to the CBA, but the state courts rejected that argument and rested squarely on the pretext finding, which, they decided as a matter of state law that is, of course, unreviewable here, obviated the need to look at the CBA.

Nor is there any conflict between the decisions below and the First Circuit's decision in Magerer v. John Sexton & Co., 912 F. 2d 525 (1st Cir. 1990). The claim in that case was under a statute which, as construed by the court, provided that it was the CBA, not the statute, that provided the standard for deciding whether the employer's conduct was retaliatory or discriminatory. Id. at 529. In those circumstances, the state anti-discrimination law was simply a means for enforcing the CBA itself, and so suit under the statute was preempted by section 301. Here, by contrast, not only is the state law independent of the contract, but on the facts of the case, it was unnecessary for the courts below to decide whether that CBA was violated, and so the reasoning in Magerer is not at all inconsistent with the decision below.

2. In Lingle v. Norge, 486 U.S. 399 (1988), this Court held that a workers compensation retaliatory discharge cause of

action may be decided without interpreting the CBA, and that, Accordingly, lawsuits for retaliatory discharge were not preempted by section 301 of the LMRA. Following Lingle, the lower federal courts have generally held that an employer's mere assertion, in defense of a state law retaliation case, that it acted consistently with the CBA, is not sufficient to preempt the state law claim. After all, if mere assertion of a contract defense were enough to warrant preemption, then all discrimination cases would be preempted, and Lingle itself would be a dead letter. However, the ultimate question in such cases is one of fact -- was the employer's motive one of discrimination against the injured worker, or did the employer have some other motive -- and that question may normally be decided without construing the CBA. Miller v. AT&T Network Sys., 850 F. 2d 561, 569-550 (9th Cir 1988) ; Simplex v. Chrysler Corp., 879 F. 2d 1326 (6th Cir 1989) (en banc); Bettis v. Oscar Meyer Foods Corp. 878 F. 2d 192, 197 (7th Cir 1989). See Also Banks v. General Motors Corp., 904 F. 2d 344 (6th Cir 1990)

There may be a question lurking in some such cases, concerning the proper way in which to handle contract questions that do arise, when the court is unable to avoid considering them by finding that they have been raised as a pretext, as happened here. The Court indicated in Lingle that section 301 might govern the judicial resolution of the contractual questions without necessarily preempting the remainder of the case. 486 U.S. at 413 n.12. The lower courts have barely begun to address the significance of footnote 12, and this Court may ultimately have to

decide, in an appropriate case, how the resolution of those questions is to be accomplished. But that issue is not presented here, where the agency found it unnecessary to decide any questions of CBA interpretation.

Petitioner seizes on the reference by the courts below to the one-year reemployment period to establish that they relied on the CBA in order to decide this case. In fact, however, it was petitioner that introduced the argument about the one-year period into the case, in an attempt to show that its failure to re-employ Gameto after the passage of one year following the November 15, 1984 layoff was justified and not discriminatory. The Commission noted that argument, but found that one of petitioner's agents told respondent that petitioner had a job for her within that one year period, thus undercutting petitioner's defense. In order to reject petitioner's defense, it was unnecessary for the Commission to decide any questions of contractual interpretation -- indeed, there was no dispute before the Commission or in the lower courts about the existence or significance of the one-year rule -- and so the rejection of petitioner's defense did not depend on the CBA, and there was no basis for preempting the state's regulation.[2]

3. There is another reason why petitioner errs by invoking the line of cases including Allis-Chalmers Corp. v. Lueck,

[2] The petition also states that the Commission's determination of respondent's ability to perform certain jobs was based on a contract clause, Pet at 21. To the contrary, this is a factual question that is decided by comparing actual jobs to actual medical restrictions, and not by construing a CBA, and the portion of the decision cited in the petition makes no reference to the CBA. See Pet.App. A59-A60

471 U.S.202 (1985) and Lingle v. Norge, supra, to show conflicting analyses that warrant review here: unlike all of those cases, this case involves the action of a state regulatory agency, and not a lawsuit in state or federal court. Petitioner does not cited any cases applying the peremption analysis of Lingle v. Norge to state agency proceedings, and we are not aware of any.

This Court has long recognized that the principles governing the enforcement of CBA's under section 302 of the LMRA do not preempt the National Labor Relations Board from deciding issues of contractual interpretation when necessary to resolve an unfair labor practice case. NLRB v. Strong 393 U.S. 357, 360-361 (1969). Similarly, even if a state agency needed to construe a CBA, that would not necessarily mean that the state agency needed to construe a CBA, that would not necessarily mean that the state agency's authority was preempted by federal law. In the absence of any conflict among the lower courts concerning the applicability of section 301 preemption in such cases, there is no basis for this Court to grant review in this case to address that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS and MEMORANDUM IN OPPOSITION was mailed this 31ST day of August ,1991 to:

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